SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 620

INTERNATIONAL HARVESTER COMPANY, APPELLANT,

vs.

WISCONSIN DEPARTMENT OF TAXATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

	Original	Print
Proceedings in Supreme Court of Wisconsin	1	1
Order allowing appeal and fixing and approving bond	1	1
Petition for allowance of appeal, assignments of error and prayer for reversal	4	2
Assignment of errors	8	3
Appeal bond (omitted in printing)	84	
Citation (omitted in printing)	86	
Praecipe for transcript of record	104	5
Caption (omitted in printing)	108	
Record from Circuit Court of Dane County	109	7
Notice of appeal to Supreme Court of Wisconsin	109	7
Proceedings before Board of Tax Appeals of Wisconsin	110	8
Testimony of Herbert Kuentz	110	8
Colloquy between Board and counsel	120	14
Testimony of Herbert Kuentz (recalled)	122	16
Testimony of Charles L. Johns	125	17
Exhibit 6—Stipulation of facts	128	18
Exhibit 7—Recomputation of liability for additional Wisconsin privilege dividend taxes computed in accordance with percentage of surplus method ordered by Wisconsin Supreme Court, etc.	132	22
Exhibit 7a—Stipulation, including Computation of Wisconsin Dividend Taxes, etc.	142	30
Supplementary stipulation of facts	150	36
Decision and order of Board of Tax Appeals	151	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1944.

	Original	Print
Record from Circuit Court of Dane County—Continued		
Petition on appeal from Board of Tax Appeals	159	41
Decision of Court	167	48
Judgment	177	57
Notice of application for entry of judgment (omitted in printing)	179	
Excerpts from appellant's brief	180	58
Argument and submission	182	59
Judgment	183	60
Opinion, Wickhem, J.	185	60
Motion for rehearing	196	69
Excerpts from appellant's brief in support of motion for rehearing	197	70
Order retaining record	198	70
Order denying motion for rehearing	199	71
Opinion on rehearing	201	71
Certificate of clerk (omitted in printing)	202	
Statement of points to be relied upon and designation of parts of record to be printed	203	72
Order noting probable jurisdiction	205	73

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Appellee.

ORDER ALLOWING APPEAL AND FIXING AND APPROVING BOND—
Filed December 11, 1943

The petition of International Harvester Company, the above named Appellant, for an allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin having this day been filed, and there having been presented and filed assignments of error, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause as provided by law, and the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record and proceedings in the above entitled cause to the Supreme Court of the United States, so that the transcript shall be filed with the Court within forty (40) days from the date hereof.

It is further ordered that security for costs on the appeal be fixed in the sum of $1,000.00, bond for which with Fidelity and Deposit Company of Maryland as surety is now presented by Appellant, is approved, and is ordered filed.

[fol. 2] Entered at Madison, Wisconsin, this 11th day of December, 1943.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 3] [File endorsement omitted.]

[fol. 4] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL—Filed December 11, 1943

International Harvester Company, the above named Appellant, being aggrieved by the decision and judgment of the Supreme Court of the State of Wisconsin rendered in the above entitled cause on June 16, 1943, and its denial on September 14, 1943 of Appellant's motion for rehearing thereof, which decision and judgment affirmed the judgment of the Circuit Court for Dane County, Wisconsin, in turn affirming a certain assessment of taxes made by Wisconsin Department of Taxation, and sustained the validity of the law (Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937) under which said tax assessment was made, notwithstanding there was drawn in question the constitutionality of said law and the assessment thereunder as applied to Appellant under the Fourteenth Amendment of the Constitution of the United States, hereby prays that an appeal by this Appellant be allowed herein to the Supreme Court of the United States to the end that said decision and judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this Appellant; and that an order be made fixing the amount of bond required of Appellant herein on such appeal.

[fol. 5] In support of this petition for appeal Appellant assigns the following errors in the record and proceedings in said cause:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, as applied to International Harvester Company, a New Jersey corporation, and its stockholders, especially the non-residents of Wisconsin, under the undisputed facts of the case, was invalid because in effect an imposition of a tax on transactions beyond the State's jurisdiction and hence repugnant to the Fourteenth Amendment of the Constitution of the United States.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this matter,

purporting to have been made in pursuance of the provisions of Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, against International Harvester Company, a New Jersey corporation, under the undisputed facts, operated to take the property of Appellant and of its stockholders, especially the non-residents of Wisconsin, without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) The Supreme Court of Wisconsin erred in failing affirmatively to determine and hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, and the assessments of taxes thereunder against Appellant, insofar as the same operated or were applied to tax the distribution of income or profits of Appellant derived and accumulated prior to the enactment of that law, deprived Appellant and its stockholders of property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 6] For these errors the said Appellant prays that the judgment of the Supreme Court of Wisconsin be reversed and judgment directed granting to Appellant the relief prayed for in its appeal to the Supreme Court of the State of Wisconsin in respect to the tax assessment complained of.

John A. Kratz, 1001 Fifteenth St., N. W., Washington, D. C., Edward R. Lewis, 180 N. Michigan Ave., Chicago, Ill., Ray M. Stroud, 1 W. Main St., Madison, Wis., Attorneys for Appellant. Stroud, Stebbins & Wingert, of Counsel.

[fol. 7] [File endorsement omitted.]

[fol. 8] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 11, 1943

Appellant, International Harvester Company, in support of its petition for appeal to the Supreme Court of the United States in the above entitled cause, hereby assigns

the following errors in the record and proceedings in said matter:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, as applied to International Harvester Company, a New Jersey corporation, and its stockholders, especially the non-residents of Wisconsin, under the undisputed facts of the case, was invalid because in effect an imposition of a tax on transactions beyond the State's jurisdiction and hence repugnant to the Fourteenth Amendment of the Constitution of the United States.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this matter, purporting to have been made in pursuance of the provisions of Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, against International Harvester Company, a New Jersey corporation, under the undisputed facts, operated to take the property of Appellant and of its stockholders, especially the non-residents of Wisconsin, [fol. 9] without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) The Supreme Court of Wisconsin erred in failing affirmatively to determine and hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, and the assessments of taxes thereunder against Appellant, insofar as the same operated or were applied to tax the distribution of income or profits of Appellant derived and accumulated prior to the enactment of that law, deprived Appellant and its stockholders of property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

John A. Kratz, 1001 Fifteenth St., N. W., Washington, D. C.; Edward R. Lewis, 180 N. Michigan Ave., Chicago, Illinois; Ray M. Stroud, 1 W. Main St., Madison, Wisconsin, Attorneys for Appellant.

Stroud, Stebbins & Wingert, of Counsel.

[fols. 10-103] [File endorsement omitted.]

[fol. 104] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED INTO THE TRANSCRIPT—Filed December 27, 1943

To the Clerk of the Supreme Court of the State of Wisconsin:

In conjunction with Appellant's appeal to the United States Supreme Court in the above entitled cause, in which Order Allowing Appeal was issued December 13, 1943, and on the same date filed with you, you are hereby requested to prepare, certify and transmit as part of the transcript to the Clerk of the United States Supreme Court, in accordance with the requirements of statute and of the rules of that Court, the following:

1. Testimony of Herbert Kuentz before Wisconsin Board of Tax Appeals, appearing at Record pages 28 to 37; and transcript of continuation of hearing before said Board appearing at Record pages 40 to 44.

2. Testimony of Charles L. Johns appearing at Record page 46, being the first three questions and answers on direct examination, and on cross-examination at Record pages 48 and 49.

3. Stipulation of Facts, being Exhibit 6, on hearing before Wisconsin Board of Tax Appeals, Record pages 72-75.

4. "Recomputation of liability for additional Wisconsin prvilege dividend taxes computed in accordance with percentage of surplus method ordered by Wisconsin Supreme Court in *J. C. Penney Co. v. Department of Taxation*, 298 N. W. 186", being Exhibit 7, on hearing before Wisconsin Board of Tax Appeals, Record pages 76-86.

[fol. 105] 5. Stipulation before Wisconsin Board of Tax Appeals, including "Computation of Wisconsin dividend taxes in accordance with percentage of surplus method ordered by Wisconsin Supreme Court in *J. C. Penney Co. v. Department of Taxation*, 298 N. W., 186, and on basis of an analysis of the *separate* surplus of International Harvester Company", being Exhibit 7A, of hearing before Wisconsin Board of Tax Appeals, Record pages 88-95.

6. Supplementary stipulation of facts before Wisconsin Board of Tax Appeals, Record page 111.

7. Decision and Order of Board of Tax Appeals, Record pages 121-127.

8. Appeal to Circuit Court for Dane County, Wisconsin, Record pages 1-8 (omitting Exhibit "A" thereto, being copy of Decision and Order of Board of Tax Appeals called for above).

9. Decision of Hon. Alvin C. Reis, Judge, in Circuit Court for Dane County, Record pages 127-137.

10. Judgment of Circuit Court for Dane County, Record pages 141-143.

11. Appeal to Wisconsin Supreme Court, Record page 145 (omitting Exhibit "A" and Exhibit "B" thereto, being copy of Order and Judgment of Circuit Court for Dane County and the latter being called for above).

12. Excerpts from Appellant's brief in the Supreme Court of Wisconsin as follows:

Proposition "II" at page 30.
Proposition "III" at page 33.
Proposition "IV" at page 38.
Proposition "V" at page 40.

13. Decision and Judgment of Wisconsin Supreme Court dated June 16, 1943.

14. Appellant's Motion for Rehearing in Wisconsin Supreme Court filed July 3, 1943.

[fol. 106] 15. Excerpts from Appellant's brief in support of Motion for Rehearing in Supreme Court of Wisconsin as follows:

Heading appearing at page 1.
Heading "B" at page 10.
Heading at page 11.
Heading at page 16.

16. Decision and Judgment of Wisconsin Supreme Court on Motion for Rehearing dated Sept. 14, 1943.

17. Petition for allowance of appeal to United States Supreme Court, Assignment of Errors and Prayer for Reversal, filed December 11, 1943.

18. Assignment of Errors of Wisconsin Supreme Court filed December 11, 1943.

19. Statement as to Jurisdiction of United States Supreme Court, filed December 11, 1943.

20. Appellant's Appeal Bond filed December 11, 1943.

21. Order allowing appeal to United States Supreme Court, fixing and approving bond, dated and filed December 11, 1943.

22. Citation to Appellee on appeal to United States Supreme Court dated December 11, 1943.

23. Service of Appeal papers on Appellee and statement directing Appellee's attention to paragraph 3 of Rule 12 of Rules of Supreme Court of the United States, filed December 13, 1943.

24. Affidavit of service of appeal papers and Citation on Appellee, dated and filed December 13, 1943.

25. This Praecipe indicating portions of record to be incorporated into the transcript, dated and service acknowledged December 17, 1943.

Dated this 17th day of December, 1943.

John A. Kratz, Edward R. Lewis, Ray M. Stroud,
Attorneys for Appellant.

[fol. 107] Due service of the foregoing Praecipe this 17th day of December, 1943, is hereby acknowledged.

John E. Martin, Attorney General of Wisconsin, by
H. H. Persons, Asst. Atty. General, Attorney for
Wisconsin Department of Taxation.

[fol. 107a] [File endorsement omitted.]

[fol. 108] [Caption omitted]

[fol. 109] In Circuit Court for Dane County

International Harvester Company, Petitioner and Appellant,

vs.

Wisconsin Department of Taxation, Respondent

Notice of Appeal to Supreme Court

Please Take Notice that the petitioner above named hereby appeals to the Supreme Court of the State of Wis-

consin from the order of the Circuit Court for Dane County, dated the 17th day of September, 1942, in the above entitled matter, and from the judgment in the above entitled matter dated and entered on the 17th day of September, 1942, affirming an additional assessment of privilege dividend taxes against the above named petitioner, this appeal being from the whole of such order and from the whole of such judgment. Copy of such order and of such judgment are hereto attached and marked, respectively, Exhibit "A" and Exhibit "B".

Dated this 14th day of October, 1942.

R. M. Stroud, Edward R. Lewis, Attorneys for International Harvester Company.

To Wisconsin Department of Taxation; John E. Martin, Esq., Attorney General of the State of Wisconsin; Harold H. Persons, Assistant Attorney General of the State of Wisconsin; Clerk of Circuit Court for Dane County, Wisconsin.

[fol. 110] Before the Board of Tax Appeals of Wisconsin

Testimony of Herbert Kuentz

Whereupon Herbert Kuentz, being first duly sworn, testified as follows:

By Mr. Teschner:

Q. Mr. Kuentz, will you state your full name for the record?

A. Herbert D. Kuentz.

Q. And what is your status with the department of taxation?

A. Chief accountant in the income tax division.

Q. And you are a certified public accountant also?

[fol. 111] A. Yes sir.

Q. And how long have you been with the department of taxation?

A. About twenty-four years.

Q. And how many of those years were you chief accountant approximately?

A. About eight.

Q. And do you have supervision of the field audits made by the corporation field auditors in income and privilege dividend tax cases?

A. Yes.

Q. And do you review each one of those reports submitted by those auditors?

A. Not each one.

Q. But substantially all?

A. I review all on which there is any controversy.

Q. I see, and Mr. Kuentz, are you familiar with the recomputation of the privilege dividend tax liability after the Penney decision in the present case?

A. I am.

Q. And I show you Exhibit 7 and ask you if that is a copy of the recomputation made by Mr. Michlar under your direction and supervision?

A. Yes, it is.

Q. And will you look at these work sheets and see if that is the original report prepared by Mr. Michlar, of which Exhibit 7 is an exact copy?

A. Yes, it is.

Q. Would you please explain to the board of tax appeals and for the record how you recomputed the privilege divi- [fol. 112] dend tax liability, that is, under your interpretation of the supreme court's mandate in the J. C. Penney case, and will you please start from the beginning.

A. Probably the members of the board would want a copy of this so that they could understand.

Q. Yes, I will give them a copy—I am sorry. First, Mr. Kuentz, you might point out the actual computation and compare it with the original computation. That would be page one of this exhibit, would it not?

A. Yes, the net result of the additional privilege dividend taxes on the basis of this revised computation is shown in Exhibit A of Exhibit 7, page 1, and is $62,446.63, exclusive of penalty and interest.

Q. And it is correct, is it not, Mr. Kuentz, to say that the dividends in question in this period were paid from accumulated surplus?

A. We have so construed it, yes.

Q. Yes, after our stipulation and therefore it was necessary to determine the per cent of Wisconsin surplus that went to make up each dividend payment.

A. Yes sir.

Q. And that you did on Exhibit B, which commences on page two of the particular report you are examining now. Is that correct?

A. That is correct.

Q. And now, I notice that you start with a balance on January 1, 1928. Why is that?

A. The reason that we didn't go back of January 1, 1928 to analyze this surplus is that the entire surplus as of that date was dissipated by charges during that year. The sur- [fol. 113] plus as of January 1, 1928, shown by the tax returns filed by the corporation, amounted to $68,255,323.16. During the year 1928 there was transferred from this surplus to the capital stock account $66,137,770. It is my understanding that this transfer from surplus to capital stock was made in connection with a change in the capital structure, the common stock of one hundred dollars par value being changed to four shares of no par value. In addition, there were dividends paid in the year 1928 of some seventeen odd million of which $2,117,553.16 go to dissipate the balance of that opening surplus.

Now then, the income for the year 1928, the book income as shown by the tax return filed by the corporation is $21,394,298.41. Of that amount we have assigned 5.93587% to Wisconsin, or an amount of $1,269,937.72. That per cent was obtained as is shown in schedule 1 on page 4, as follows: The total taxable income of the corporation for the year 1928 was $48,381,125.12. The portion taxable by the state of Wisconsin was $2,871,841.03. The ratio of the taxable portion to the total is the 5.93587%, which on Exhibit B we applied to the book income.

Now then, by addition and subtraction we arrive at the balance of surplus as of December 31, 1928, the total being six odd million, the Wisconsin portion $384,709.62, and the portion allocated outside Wisconsin $6,096,389.83. There also the ratio of the Wisconsin portion to the total is 5.93587%.

The book income for 1929 was allocated between Wisconsin and outside of Wisconsin in the same manner as I described for the income of the year 1928. The dividends paid [fol. 114] during the year 1929 were first charged against the balance of surplus as of December 31st, 1928, and the six million, 481 thousand was entirely dissipated. The balance of the dividends paid in 1929, nine million, 984 thousand odd, were then charged against the income for the year 1929, the only remaining source from which dividends could be paid. And they were charged—they were allocated against that income on the same ratio, 6.13689, which is the percentage of Wisconsin 1929 income to the total income.

Likewise, the 1930 income was prorated between Wisconsin and the total on the same basis in the same manner as the 1928 income was allocated, and the 1930 dividends paid were charged against the surplus balance as of January 1, 1930.

Coming down to the 1931 income, you will observe that this income is divided into two parts, first the income of those companies which were included in the Wisconsin consolidation and then the income or loss of those companies which were excluded from the Wisconsin consolidation. The income included—the book income included in the Wisconsin consolidation amounted to $9,190,235.47. This was prorated between Wisconsin and outside of Wisconsin as is shown on schedule 4. The book income included in the Wisconsin consolidation was reduced by the non apportionable income which had its situs outside the state of Wisconsin, the amount being $1,915,728.80, leaving a balance of apportionable income of the companies included in the Wisconsin consolidation of $7,274,506.67. Of this amount 7.80922% was allocated to Wisconsin. This is the percentage of allocation determined in the tax commission's 1931 to 1936 income tax audit report, making an amount al- [fol. 115] located to Wisconsin of $668,082.22, which is 6.18136 per cent of the total book income.

Then turning back again to Exhibit B, the loss of the steel department and other companies not included in the Wisconsin consolidation, being $4,950,670.11, was entirely charged against the surplus allocated to outside of the state of Wisconsin. The dividends paid in 1931 were again charged against the balance of surplus as of January 1, 1931, in the same ratio that the Wisconsin surplus bore to the total surplus.

In 1931 there was transferred from certain sundry contingent reserves to the surplus account an amount of eleven million dollars. In this report this eleven million dollars was prorated as between Wisconsin and outside of Wisconsin in the same ratio as the surplus for Wisconsin bears to the total surplus on January 1, 1931.

Mr. Stroud: Just so that I may avoid cross examination, I wonder whether you would explain whether the contingent reserves, the amount of the contingent reserves, eleven million dollars, where that came from, and whether that should be apportioned within and without Wisconsin on that same percentage basis.

Witness: The eleven million dollars consists of certain reserves that were set up for contingencies but which were not deducted for income tax purposes. They were, however, deducted in order to determine the book income, and for that reason they have been restored on the same ratio we have in the surplus as of the beginning of the year.

Then proceeding to 1932, there again the income is divided into two parts and with the same explanation as I have [fol. 116] given in 1931—for the year 1931. In this case they are both losses. The loss of the companies included in the Wisconsin consolidation amounted to $3,079,761.15. This was prorated between Wisconsin and the total as is shown. The reference states schedule 1, but schedule 1 again refers back to schedule 3 so that you will have to turn to schedule 3 to get the proration of the loss for that year. The total net loss for income tax purposes was $14,147,751.83. From this is deducted the non apportionable income of $1,447,000 odd, leaving an apportionable net loss of $15,595,109.91. There was no apportionment data submitted with the 1932 tax return, possibly for the reason that there was none required because it wasn't necessary to prorate a taxable loss nor was there any apportionment data computed in our audit report covering that year, so that in order to prorate this loss, we took the average of the apportionment percentages for the years 1928, 1929, and 1930, which percentages were complete in the returns filed by the corporation and in our audit reports. The average of those percentages amounting to 6.13643 was applied to the fifteen million odd loss, giving a Wisconsin taxable loss of $956,982.94.

Now, following that under schedule 1, the 956 odd thousand compared with the total net loss of fourteen odd million results in a percentage for Wisconsin of 6.76420, which is the percentage used on Exhibit B.

The dividends for the year 1932 were again charged to surplus in the same ratio as the surplus balance at the beginning of the year. Likewise a transfer from contingent [fol. 117] reserves to surplus of ten million in 1932 was again prorated between Wisconsin and outside of Wisconsin at the ratio of the surplus balances at the beginning of that year.

Coming then down to the income for the year 1933, that was again divided as between the companies in the Wisconsin consolidation and those outside of the Wisconsin con-

solidation. The companies in the Wisconsin consolidation, the book income was prorated as is shown on schedule 4, page 7. The total book income for the year 1933 was $4,908,228.51. Deducting the non apportionable income of $8,948,479.01, leaves an apportionable book income of $959,749.50. Of this 7.84059 per cent was allocated to Wisconsin. That percentage was determined as is shown in schedule 5 and represents the average of the per cent of Wisconsin tangible assets to the total, the per cent of Wisconsin cost of manufacturing to the total, but the sales for Wisconsin were not shown in that year either on the tax return or in the department's audit report, so that for the sales percentage we used the average for the years 1934, 1935, and 1936, which average per cent is 3.22179, and the average of the three percentages as stated before, is 7.84059, making a book income apportioned to Wisconsin of $75,250.02 or 1.53314 per cent of the total book income.

The transfer to surplus from contingent reserves of ten million dollars in 1933 was handled in the same manner as described for the years 1931 and 1932. Likewise the dividends paid for 1933 were charged against surplus in the same ratio as the surplus balances at January 1, 1933.

The 1934 income of the companies included in the Wis- [fol. 118] consin consolidation was prorated in the same manner as explained for the years 1928 and 1929. Likewise the dividends paid for 1934 were charged on the basis of the ratio of the opening surplus balances.

Turning then to page 3, the 1935 income was again prorated between Wisconsin and outside of Wisconsin on the same basis as described for 1928 and 1929. The dividends for 1935 were charged against the opening surplus balances in the ratio of the surplus balances as of the beginning of the year. The same explanation applies for the income of 1936, the transfer of reserves in 1936 and the dividends paid in 1936 as has been given in previous years.

Q. Now, Mr. Kuentz, would you tie that up with Exhibit A as to the dividends that are actually taxable?

A. Yes. In Exhibit A there are shown one dividend paid in the year 1935, that is subject to the privilege dividend tax and that is the dividend paid on December 2, 1935. The portion of that dividend attributable to Wisconsin is obtained from the ratio of the surplus balances as of December 31, 1934, as shown on page 3 of Exhibit B, or 5.78469

per cent. The dividends paid during the year 1936 up to and including the dividend of October 15, 1936, the portion of those dividends attributable to Wisconsin are computed on the basis of the surplus ratio as shown in Exhibit B, as of December 31, 1935, or 6.12580 per cent. The one remaining dividend in 1936 is computed—the Wisconsin portion is computed on the basis of the ratio as of October 31, 1936, for the reason that the company at that time changed its fiscal year from a calendar year to October 31st, fiscal year. And all of the dividends for the year 1937 including—up to and [fol. 119] including the dividend paid October 15th, 1937, the portion of those dividends attributable to the state of Wisconsin are computed at the percentage of the Wisconsin surplus to total surplus as shown on Exhibit B as of October 31, 1936, or 6.61902 per cent.

Mr. Teschner: All right, Mr. Kuentz, that is all. Thank you.

[fol. 120] COLLOQUY

Mr. Broadfoot: This is a continuation of the hearing of the International Harvester Company, petitioner, vs. the Wisconsin Department of Taxation, respondent, that was held before the board on September 23rd, 1941, adjourned to this date by stipulation of the parties.

Mr. Teschner: May it please the board, at the close of the last hearing in this matter, the respondent introduced in evidence a recomputation of Wisconsin privilege dividend tax liability of the petitioner corporation. That computation was the first one that the petitioner had seen and it requested the right to check and examine the recomputation. That was done, and after some correspondence and a conference, a revised further recomputation was agreed upon, and a stipulation has been drawn with respect to that particular revised recomputation and that will — intro- [fol. 121] duced in evidence here this afternoon.

Before proceeding with that matter, there are three slight errors in the transcript of the hearing held heretofore, and with the board's permission we would like now to make those corrections.

On page 7 of the transcript, the second question from the bottom should read "And will you look at these work sheets and see if that is the original report prepared by Mr. Michlar". The word "prepared" being substituted for

the word "presented". I understand that Mr. Stroud has no objection to that change being made.

Then on page 8 of the transcript—these changes are just minor, they don't affect the substance—there should be a comma after the word "liability" in the first line, the word "what" should be "that", and there should be a comma after "is", and then the word "under" should appear before the word "your", and the correction is made. So that it reads, "tax liability, that is, under your interpretation of the supreme court's mandate".

Then the only other change is on page 11, in the first full paragraph on that page, in the last sentence of the paragraph, the word "income" should be changed to "surplus", so that that sentence reads "The dividends paid in 1931 were again charged against the balance of surplus as of January 1, 1931, in the same ratio that the Wisconsin surplus bore to the total surplus". Those are the only corrections.

The Chairman: Are those changes satisfactory, Mr. Stroud?

Mr. Stroud: Yes.

Mr. Teschner: I would now like to have marked as Ex- [fol. 122] hibit 7 A a computation of Wisconsin privilege dividend taxes, based upon the precentage of surplus method ordered by the supreme court in the J. C. Penney case, and upon a basis of an analysis of a separate surplus of the International Harvester Company, together with a stipulation with respect to said recomputation.

Mr. Stroud: No objection to that offer, except I take it that we do not concede that this computation is in accordance with the percentage of surplus method ordered by the Wisconsin supreme court in the Penney case.

Mr. Teschner: Well, the stipulation explains that.

Mr. Stroud: It speaks for itself.

Mr. Teschner: That is right, it speaks for itself and it is clear.

(Discussion off the record.)

The Chairman: Have you offered Exhibit 7-A in evidence?

Mr. Teschner: I am going to call Mr. Kuentz in reference to that before offering it.

HERBERT KUENTZ, having been heretofore duly sworn, recalled, testified as follows:

Q. Mr. Kuentz, you are the same Herbert Kuentz who testified at a previous hearing on this matter, on September 23rd, are you?

A. I am.

Q. And I would like to show you Exhibit 7-A and ask you to refer to that part labelled "computation" and, did you prepare Exhibit 7-A insofar as the computation is concerned?

A. Well, I think it is more correctly stated if you refer only to Exhibit A or the entire——

Q. I refer to the entire computation of 7-A, everything ex- [fol. 123] cept the stipulation.

A. That was originally prepared by the taxpayer and submitted to us at a conference.

Q. And you have checked it?

A. I have had the entire exhibit checked, yes.

Q. And did the petitioner furnish you with a proposed revision of Exhibit 7 in this case?

A. Yes, that is 7-A is the proposed revision of 7.

Q. And 7-A has been accepted by the department as setting forth the correct computation of privilege dividend taxes under the method used by the department?

A. That is correct.

Q. In what respects does the computation in Exhibit 7-A differ from that in Exhibit 7 heretofore introduced?

A. The major difference between Exhibit 7 and 7-A is that in 7 the surplus analysis includes a consolidated surplus of International Harvester Company and a number of its affiliated companies, whereas the analysis in 7-A is of International Harvester Company alone. It is the separate surplus of International Harvester Company.

The second major difference is probably the starting point. In Exhibit 7 surplus analysis began with the balance on January 1, 1928, whereas in Exhibit 7-A the surplus analysis so far as it is used in this computation, begins with January 1, 1931. The reason for that is that the—in taking the separate surplus of International Harvester Company it was not necessary to go beyond January 1, 1931, because at that point the company had a deficit, and the entire surplus had been dissipated. Perhaps one other major differ- [fol. 124] ence can be pointed out in Exhibit B-1 of 7-A, that

is on page three, there were a number of years in which International Harvester Company took on to its books the increase in value of the subsidiary companies. In this exhibit that surplus transferred from the subsidiaries to International Harvester in those years has been eliminated, so that we wind up with the separate surplus of International Harvester Company alone.

Mr. Conway: By this exhibit, what do you refer to, give us the number.

A. Exhibit 7-A, page 3, sub Exhibit B-1. There are other minor differences in the method of computing the Wisconsin taxable income.

Q. But those differences only related to the determination of Wisconsin income. Is that not correct?

A. Yes, and I think they are self-explanatory in this Exhibit 7-A.

Q. Yes. Then you won't need to explain them, Mr. Kuentz. The amount of tax exclusive of penalty and interest, is that shown on schedule A of Exhibit 7-A?

A. Yes, it is.

Q. How does that compare with the tax computed in Exhibit 7?

A. The additional privilege dividend taxes for the entire period on Exhibit 7 is $62,446.63. The amount of additional taxes on 7-A is $53,713.29.

Mr. Teschner: That is all, Mr. Kuentz. You may cross examine.

Mr. Stroud: No examination.

Mr. Teschner: We now offer Exhibit 7 A in evidence.

[fol. 125] Testimony of Charles L. Johns

CHARLES L. JOHNS, having been first duly sworn, testified as follows:

Mr. Stroud:

Q. Will you state for the record your name Mr. Johns?

A. Charles L. Johns.

Q. What is your position with the International Harvestor Company?

A. I am the auditor of tax, in charge of tax returns.

Q. And you have been with the company how long?

A. I have been with the company for thirty years, little more than thirty years.

[fol. 126] Cross Examination of Charles L. Johns

Q. Mr. Johns, are you familiar with the manner in which the earnings of the International Harvester Company are handled?

A. Yes, sir.

Q. Mr. Johns, I would like to read you from the supreme court decision, the Wisconsin supreme court decision in the J. C. Penney case that was most recently decided by that court, I am quoting: "The earnings are handled according to ordinary business practice. They are not earmarked or segregated or manipulated in any manner whatever". That is the end of the quotation. I now ask you, Mr. Johns, whether that statement is true with respect to International Harvester Company, the petitioner here?

A. Yes sir, I would say it is. We don't earmark any of [fol. 127] our earnings that go directly to surplus account.

Q. And they and hendled according to ordinary business practices?

A. That is correct.

Mr. Teschner: That is all, Mr. Johns.

[fol. 128] Exhibit 6

In Re: Privilege Dividend Tax Apepal—International Harvester Company vs. Wisconsin Department of Taxation

Docket D-5

Stipulation of Facts

The parties hereto stipulate that the following are facts and that this Stipulation may be received as evidence thereof, Petitioner being hereby relieved of the necessity of making formal proof thereof; that, however, Respondent does not hereby waive its right to object to the materiality or relevancy of such evidence to the issues in this appeal.

(1) The International Harvester Company is a corporation organized September 19, 1918, under the laws of the State of New Jersey. Its principal office is in Hoboken, New Jersey. During the entire period since September 26, 1935, when the Wisconsin Privilege Dividend Tax be-

came effective, the general offices of the International Harvester Company have been located, until October 31, 1937 at 606 South Michigan Avenue, and since then at 180 North Michigan Avenue, Chicago, Illinois.

(2) The International Harvester Company is admitted to do business in every state of the United States except Nevada, and has been so admitted since January 1, 1936. Until December 31, 1935, the products manufactured by the International Harvester Company were distributed in the United States by the International Harvester Company of America, a Wisconsin corporation, all of whose capital stock was owned or controlled by the International Harvester Company, and the International Harvester Company of America operated all the selling branches in Wisconsin and the rest of the United States. Since 1920 the International Harvester Company has had manufacturing plants in Illinois, Indiana, New York, Tennessee, Ohio, Louisiana and in Milwaukee, Wisconsin. It has more than 100 selling branches in the United States. In the State of Wisconsin it has selling branches in Milwaukee, Madison, Eau Claire and Green Bay. After December 31, 1935, except in Wisconsin, said products manufactured by the International Harvester Company were distributed by the branches of the International Harvester Company, and since October 31, 1939, all the branches in the United States have been owned and operated by the International Harvester Company. In the last fifteen years there have been more than 100 selling branches in the United States.

(3) The executive offices of the International Harvester Company are located at its general offices in Chicago, Illinois. The heads of its various departments, Executive, Manufacturing, Sales, Purchasing, Treasury and other departments are all located and conduct their business at its general offices in Chicago, Illinois. The executive policies [fol. 129] of the Company are determined by its officers in said general offices in Chicago, Illinois; the purchasing of supplies for its manufacturing plants, and the manufacturing orders on the manufacturing plants are issued from the general offices in Chicago, and the general policies of the Company there determined. The directors' meetings are held at the general office of the Company in Chicago, Illinois, and always have been so held. No directors' meet-

ings have ever been held in the State of Wisconsin. The facts set forth in this paragraph have been true for the entire history of the Company since September 19, 1918.

(4) Sales by the selling branches are made both for cash, and partly for cash and notes. All cash received by the selling branches and the proceeds of all notes when paid are deposited by the selling branch in its Deposit Account. Funds in the Deposit Account of a branch cannot be drawn on by the branch, but only by the office of the Treasury Department in Chicago, which regularly at fixed intervals draws out the money in the Deposit Account into the Treasury Department in Chicago. Likewise, receipts from all other operations or business of the Company and of its subsidiaries have been deposited in the Company's bank accounts located in Chicago, Illinois, and there commingled without segregation or ear-marking of any kind with the general funds of the Company.

The statements above made apply for the entire period covered by said audit, namely from September 26, 1935 to October 31, 1937.

(5) Section 14:8-19 of Revised Statutes of New Jersey 1937 provides as follows:

> "The directors of a corporation shall not pay dividends except from its surplus, including surplus as determined by section 14:8-6 of this title, or from the net profits arising from the business of the corporation, nor shall they divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of the corporation or reduce its capital stock except as authorized by law."

Said Section 14:8-6 provides that the capital of a corporation with no par stock may be increased by resolution of the Board of Directors, directing that a portion of the surplus be transferred to capital account, and that the Board of Directors may direct that the surplus so transferred may be treated as capital, in respect of any share without nominal or par value.

Dividends on the common stock of the International Harvester Company are paid in quarterly installments on the 15th days of January, April, July and October of each year. Dividends on preferred stock of the Company are

paid in quarterly installments on March 1st, June 1st, September 1st and December 1st of each year.

[fol. 130] The form of resolution for common stock dividends, effective in the period from September 26, 1935, to October 31, 1937, was according to the form of which the following, contained in an extract from the minutes of the Board of Directors' Meeting of April 15, 1937, is a sample:

> "The recommendation of the Executive Committee that a quarterly dividend of sixty-two and one-half cents (62½¢) per share on the common stock of the Company be paid July 15, 1937, to all holders of record of common stock of the Company at the close of business on June 19, 1937, having been considered and the Comptroller having submitted a statement showing the surplus account at May 19, 1937, before adding profits that have accrued since October 31, 1936, and the Board having considered the same and also the current earnings and the present and probable future cash demands and resources of the Company's business.
>
> "On motion, duly made and seconded, the following resolution was unanimously adopted:
>
> "Resolved, That there be paid on July 15, 1937, to all holders of record of common stock of the Company at the close of business on June 19, 1937, a quarterly dividend of sixty-two and one-half cents (62½¢) per share on the common stock of the Company."

The preferred stock dividends in the period from September 26, 1935 to October 31, 1937 were declared by resolutions, of which the one contained in the following extract from the minutes of the Directors' meeting of April 15, 1937 is a sample:

> "The Comptroller having submitted a statement showing the surplus account at April 15, 1937, before adding profits that have accrued since October 31, 1936, and the Board having considered the same and also the current earnings and the present and probable future cash demands and resources of the Company's business,
>
> "On motion, duly made and seconded, the following resolution was unanimously adopted:

"Resolved, That a dividend of One Dollar and Seventy-five Cents ($1.75) per share, being the seventy-fifth quarterly dividend, be paid on June 1, 1937 to all holders of record of the preferred stock of this Company at the close of business on May 5, 1937.

(6) The meetings of the Board of Directors at which all the dividends in question have been declared, and all acts and proceedings in respect of the declaration and payment of such dividends, have taken place at the Company's office in the City of Chicago, Illinois, the dividends having [fol. 131] been paid by the Company's Treasury Department by checks drawn on the Company's bank accounts representing its general funds on deposit in Chicago and New York City, and mailed to its many stockholders. Such dividends have not been charged against the earnings or profits of the Company of any particular class or period, but have been charged against the surplus of the Company, which resulted from and reflected the accumulated net profits and income of the Company from its entire business wherever transacted.

(7) Either party may adduce such further facts in evidence as it shall deem material at the trial of said appeal before the Wisconsin Board of Tax Appeals.

Dated, September 20th, 1941,

R. M. Stroud, Edward R. Lewis, Attorneys for Appellant, International Harvester Company. Richard R. Teschner, Attorney for Appellee, Wisconsin Department of Taxation.

[fol. 132] EXHIBIT 7

International Harvester Company, Chicago, Illinois

Recomputation of Liability for Additional Wisconsin Privilege Dividend Taxes Computed in Accordance with Percentage of Surplus Method Ordered by Wisconsin Supreme Court in J. C. Penney Company vs. Department of Taxation, 298 N. W. 186.

A. W. Michler, Auditor.

September 22, 1941. M. M., [redacted] D.

[fol. 133] International Harvester Company

Table of Contents

	Page
Exhibit A Recomputation of Additional Privilege Dividend Taxes	24
Exhibit B Analysis of Surplus	25, 26
Schedule 1 Computation of Per Cent of Wisconsin Taxable Income to Total Income	27
Schedule 2 Computation of Book Income of Companies Included in Wisconsin Consolidation	28
Schedule 3 Computation of 1932 Wisconsin Taxable Income	29
Schedule 4 Computation of Wisconsin Portion of 1931 and 1933 Book Income	29
Schedule 5 Computation of 1933 Apportionment Percentage	30

[fol. 134]

EXHIBIT A

International Harvester Company

Recomputation of Additional Privilege Dividend Taxes

Date Declared	Date Paid	Amount of Dividend	Paid From Surplus At	Per Cent Taxable	Amount Taxable	Rate Of Tax	Amount Of Tax	Tax Previously Paid	Additional Privilege Dividend Tax
10-17-1935	12- 2-1935	$ 1,429,267.00	12-31-1934	5.78469	$ 82,678.66	.025	$ 2,066.97	$0	$ 2,066.97
11-21-1935	1-15-1936	1,273,563.90	12-31-1935	6.12580	78,015.97	.025	1,950.40	0	1,950.40
1-16-1936	3- 2-1936	1,429,267.00	12-31-1935	6.12580	87,554.03	.025	2,188.85	0	2,188.85
2-20-1936	4-15-1936	1,273,565.10	12-31-1935	6.12580	78,016.05	.025	1,950.40	0	1,950.40
4-16-1936	6- 1-1936	1,429,267.00	12-31-1935	6.12580	87,554.03	.025	2,188.85	0	2,188.85
5-21-1936	7-15-1936	1,273,565.10	12-31-1935	6.12580	78,016.05	.025	1,950.40	0	1,950.40
7-16-1936	9- 1-1936	1,429,267.00	12-31-1935	6.12580	87,554.03	.025	2,188.85	0	2,188.85
7-24-1936	10-15-1936	6,792,347.20	12-31-1935	6.12580	416,085.60	.025	10,402.14	0	10,402.14
10-15-1936	12- 1-1936	1,429,267.00	10-31-1936	6.61902	94,603.46	.025	2,365.09	0	2,365.09
11-19-1936	1-15-1937	2,653,288.94	10-31-1936	6.61902	175,621.72	.025	4,390.54	0	4,390.54
1-21-1937	3- 1-1937	1,429,267.00	10-31-1936	6.61902	94,603.46	.025	2,365.09	0	2,365.09
2-18-1937	4-15-1937	2,653,291.90	10-31-1936	6.61902	175,621.92	.025	4,390.55	0	4,390.55
4-15-1937	6- 1-1937	1,429,267.00	10-31-1936	6.61902	94,603.46	.025	2,365.09	0	2,365.09
5-20-1937	7-15-1937	2,653,293.96	10-31-1936	6.61902	175,622.05	.025	4,390.55	0	4,390.55
7-15-1937	9- 1-1937	1,429,267.00	10-31-1936	6.61902	94,603.46	.025	2,365.09	0	2,365.09
8-19-1937	10-15-1937	9,021,136.12	10-31-1936	6.61902	597,110.80	.025	14,927.77	0	14,927.77
Total		$39,028,188.22			$2,497,864.75		$62,446.63	$0	$62,446.63

[fol. 135]

EXHIBIT B

International Harvester Company

Analysis of Surplus

		Total	Wisconsin	Outside	Percent Wisconsin	Reference for Percentage
Balance January 1, 1928		$68,255,323.16	$	$		
1928 Income		21,394,298.41	1,269,937.72	20,124,360.69	5.93587	Schedule 1
1928 Transfer to common capital stock December 11, 1928 on change of common stock from par value of $100.00 per share to no par value, and issue of four shares of no par value common for each share of $100.00 par value common stock		66,137,770.00				
1928 Dividends paid	$17,030,752.12	2,117,553.16				
1928 Dividends paid		14,913,198.96	885,228.10	14,027,970.86	5.93587	
Balance December 31, 1928		6,481,099.45	384,709.62	6,096,389.83	5.93587	
1929 Income		31,481,344.16	1,931,975.45	29,549,368.71	6.13689	Schedule 1
1929 Dividends paid	$16,465,629.13	6,481,099.45	384,709.63	6,096,389.82	5.93587	
1929 Dividends paid		9,984,529.68	612,739.59	9,371,790.09	6.13689	
Balance December 31, 1929		21,496,814.48	1,319,235.85	20,177,578.63	6.13689	
1930 Income		23,497,079.80	1,309,151.56	22,187,928.24	5.57155	Schedule 1
1930 Dividends paid		16,669,167.45	1,022,968.44	15,646,199.01	6.13689	
Balance December 31, 1930		28,324,726.83	1,605,418.97	26,719,307.86	5.66790	
1931 Income of companies in Wisconsin consolidation		9,190,235.47	568,082.22	8,622,153.25	6.18136	Schedule 4
1931 Income of other domestic companies and steel department		4,950,670.11		4,950,670.11		
1931 Dividends paid		16,758,909.50	949,878.20	15,809,031.30	5.66790	
1931 Transfer to surplus from sundry contingent reserves		11,000,000.00	623,469.00	10,376,531.00	5.66790	
Balance December 31, 1931		26,805,382.69	1,847,091.99	24,958,290.70	6.89075	
1932 Income of companies in Wisconsin consolidation		3,079,761.15	208,321.20	2,871,439.95	6.76420	Schedule 1
1932 Income of other domestic companies and steel department		1,199,642.88		1,199,642.88		
1932 Dividends paid		12,046,878.22	830,120.25	11,216,757.97	6.89075	
1932 Transfer to surplus from contingent reserves		10,000,000.00	689,075.00	9,310,925.00	6.89075	

EXHIBIT B—Continued

International Harvester Company

Analysis of Surplus

	Total	Wisconsin	Outside	Percent Wisconsin	Reference for Percentage
Balance December 31, 1932	20,479,100.44	1,497,725.54	18,981,374.90	7.31343	
1933 Income of companies in Wisconsin consolidation	4,908,228.51	75,250.02	4,832,978.49	1.53314	Schedule 4
1933 Income of other domestic companies and steel department	1,682,257.85	.....	1,682,257.85	.....	
1933 Transfer to surplus from contingent reserves	10,000,000.00	731,343.00	9,268,657.00	7.31343	
1933 Dividends paid	8,242,005.47	602,773.29	7,639,232.18	7.31343	
Balance December 31, 1933	25,463,065.63	1,701,545.27	23,761,520.36	6.68240	
1934 Income of companies in Wisconsin consolidation	7,959,146.63	351,573.81	7,607,572.82	4.41723	Schedule 1
1934 Income of other domestic companies and steel department	787,580.80	.....	787,580.80	.....	
1934 Dividends paid	8,264,040.00	552,236.20	7,711,803.80	6.68240	
[fol. 136]					
Balance December 31, 1934	25,945,753.06	1,500,882.88	24,444,870.18	5.78469	
1935 Income of companies in Wisconsin consolidation	15,972,826.47	1,240,465.72	14,732,360.75	7.76610	Schedule 1
1935 Income of other domestic companies and steel department	3,325,870.98	.....	3,325,870.98	.....	
1935 Dividends paid	8,864,824.20	512,802.60	8,352,021.60	5.78469	
Balance December 31, 1935	36,379,626.31	2,228,546.00	34,151,080.31	6.12580	
1936 Income of companies in Wisconsin consolidation	24,050,457.68	1,848,272.88	22,202,184.80	7.68498	Schedule 1
1936 Income of other domestic companies and steel department	2,365,225.73	.....	2,365,225.73	.....	
1936 Net transfer of contingent reserves to surplus	137,893.55	8,447.08	129,446.47	6.12580	
1936 Dividends paid	16,280,567.34	997,314.97	15,283,252.37	6.12580	
Balance October 31, 1936	46,652,635.93	3,097,950.99	43,564,684.94	6.61902	

[fol. 137]

SCHEDULE 1

International Harvester Company

Computation of Per Cent of Wisconsin Taxable Income to Total Income

	Total Income	Wisconsin Taxable Income	Per Cent Wisconsin To Total	Reference
1928 Taxable Income	$48,381,125.12	$2,871,841.03	5.93587	Amended Exhibit C of 1925 to 1930 Audit Report.
1929 Taxable Income	51,951,218.48	3,188,190.03	6.13689	Amended Exhibit C of 1925 to 1930 Audit Report.
1930 Taxable Income	24,210,850.66	1,348,921.09	5.57155	Amended Exhibit C of 1925 to 1930 Audit Report.
1931 Taxable Income	.....	.....	6.18136	See Schedule 4.
1932 Taxable Income	14,147,751.83	956,982.94	6.76420	See Schedule 3.
1933 Taxable Income	.....	.....	1.53314	See Schedule 4.
1934 Taxable Income	15,216,754.81	672,160.09	4.41723	Amended Exhibit B-1 of 1931 to 1936 Audit Report.
1935 Taxable Income	36,055,388.97	2,800,101.00	7.76610	Amended Exhibit B-1 of 1931 to 1936 Audit Report.
1936 Taxable Income	31,244,230.66	2,401,114.90	7.68498	Amended Exhibit B-1 of 1931 to 1936 Audit Report.

[fol. 138]

SCHEDULE 2

International Harvester Company

Computation of Book Income of Companies Included in Wisconsin Consolidation

	1931	1932	1933	1934	1935	1936
Consolidated Book Income of Domestic Companies	$4,239,565.36	$4,279,404.03	$3,225,970.66	$8,746,727.43	$19,298,697.45	$26,415,683.41(1)
Book Income of Companies not included in Wisconsin Consolidation:						
International Harvester Company of Argentina	2,437,327.44	1,244,141.70	302,377.73	32,821.27	538,312.05	400,062.35
Wisconsin Steel Company	118,784.64	4,561.81	100,093.37	40,354.78	104,783.57	40,319.40
Wisconsin Lumber Company	69,684.77	9,354.70	18,616.60	26,138.68	55,716.01	.....
Chicago, West Pullman & Southern Railroad Co	28,503.31	22,972.71	31,500.21	65,916.59	171,976.63	115,379.39
Illinois Northern Railway Company	31,755.05	48,538.21	4,841.02	36,049.19	93,288.08	42,456.20
Steel Department of International Harvester Company	2,264,614.90	2,377,066.55	1,287,829.34	667,009.85	2,473,226.66	1,847,656.78
Total	4,950,670.11	1,199,642.88	1,682,257.85	787,580.80	3,325,870.98	2,365,225.73
Book Income of Companies Included in Wisconsin Consolidation	$9,190,235.47	$3,079,761.15	$4,908,228.51	$7,959,146.63	$15,972,826.47	$24,050,457.68

(1) Consolidated income per tax return	$26,362,847.82
Add: Chicago, West Pullman & Southern Railway Company	115,379.39
Illinois Northern Railway Company	42,456.20
	$26,520,683.41
Deduct: Dividends received by International Harvester Company from:	
Chicago, West Pullman & Southern Railway Company	80,000.00
Illinois Northern Railway Company	25,000.00
	$ 105,000.00
	$26,415,683.41

[fol. 139]

SCHEDULE 3

International Harvester Company

Computation of 1932 Wisconsin Taxable Income

Total net loss for 1932 per Amended Exhibit B-1 of 1931-1936 audit report			$14,147,751.83
Deduct: Non-Apportionable income per 1932 tax return:			
Dividends received		$1,452,940.38	
Interest received on investments		133,956.80	
		1,586,897.18	
Deduct: Interest paid		139,539.10	
			1,447,358.08
Apportionable net loss			15,595,109.91
Percent Wisconsin:			
1928 percent Wisconsin taxable income to total apportionable income	6.24012		
1929 percent Wisconsin taxable income to total apportionable income	6.28279		
1930 percent Wisconsin taxable income to total apportionable income	5.88639		
Total	18.40930		
Average	6.13643		6.13643
1932 Wisconsin taxable income			956,982.94

[fol. 140]

SCHEDULE 4

International Harvester Company

Computation of Wisconsin Portion of 1931 and 1933 Book Income

1931	Amount	Per Cent
Book Income of Companies included in Wisconsin Consolidation, per Schedule 2	$9,190,235.47	100.00000
Deduct: Non-apportionable income per Amended Exhibit B-1 of 1931-1936 Audit Report	1,915,728.80	
Apportionable Book Income of Companies included in Wisconsin Consolidation	7,274,506.67	
Per Cent Wisconsin per Amended Exhibit B-1 of 1931-1936 Audit Report	7.80922	
Book Income Apportioned to Wisconsin	$ 568,082.22	6.18136
1933		
Book Income of Companies Included in Wisconsin Consolidation, per Schedule 2	$4,908,228.51	100.00000
Deduct: Non-apportionable income per Amended Exhibit B-1 of 1931-1936 Audit Report	3,948,479.01	
Apportionable Book Income of Companies included in Wisconsin Consolidation	959,749.50	
Per Cent Wisconsin per Schedule 5	7.84059	
Book Income Apportioned to Wisconsin	$ 75,250.02	1.53314

[fol. 141] SCHEDULE 5

International Harvester Company

Computation of 1933 Apportionment Percentage

		Wisconsin	Total	Percent
Tangible Assets (per Exhibit E of original 1931 to 1936 audit report		$10,274,197.00	$131,751,145.00	7.79818
Cost of Manufacturing (per Exhibit E of original 1931 to 1936 audit report)		2,846,963.00	22,772,417.00	12.50180
Sales				
Percent Wisconsin sales to total sales (per Exhibit E of original 1931 to 1936 audit report)	1934	3.14097		
Percent Wisconsin sales to total sales (per Exhibit E of original 1931 to 1936 audit report)	1935	3.31314		
Percent Wisconsin sales to total sales (per Exhibit E of original 1931 to 1936 audit report)	1936	3.20925		
Total		9.66536		
Average		3.22179		3.22179
Total				23.52177
Average				7.84059

[fol. 142] EXHIBIT 7a

Wisconsin Board of Tax Appeals, Madison, Wisconsin

Stipulation. Docket No. D-5

INTERNATIONAL HARVESTER COMPANY, Petitioner,

v.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

The petitioner having requested and reserved the right to analyze and check the recomputation prepared by the respondent herein and received in evidence by the Wisconsin Board of Tax Appeals at a hearing on September 23,

1941, and the petitioner and respondent having conferred thereafter at length with the result that,

It Is Hereby Stipulated and Agreed:

1. That if, under the facts heretofore stipulated herein it is presumed that International Harvester Company paid its dividends from Wisconsin income in the proportion that its earnings from Wisconsin property and business, reflected in its surplus, bore to its total surplus, then the analysis of surplus and determination of the portion of the dividends paid by said petitioner out of its surplus attributable to Wisconsin earnings, and the computation of the privilege dividend tax thereon, are correctly set forth in Exhibit "A" attached hereto and made a part hereof.

[fol. 143] 2. That this stipulation and agreement supersedes the recomputation already in evidence herein as Exhibit 7, and, subject to the conditions hereof, determines the liability of the petitioner, exclusive of penalty and interest, the petitioner, however, reserving the right to contest the validity of the privilege dividend tax law as applied to income or surplus accumulated prior to the enactment of said law, or as applied on the presumption that the International Harvester Company paid its dividends from Wisconsin income in the proportion that its earnings from Wisconsin property and business, reflected in its surplus, bore to its total surplus, or as in any manner applied to the petitioner.

Dated this 22nd day of November, 1941.

International Harvester Company, by Stroud, Stebbins & Wingert, Edward R. Lewis, Its Attorneys; Wisconsin Department of Taxation, by Richard R. Teschner, Its Atty.

[fol. 144] International Harvester Company, Chicago, Illinois

Computation of Wisconsin Privilege Dividend Taxes

In Accordance with Percentage of Surplus Method Ordered by Wisconsin Supreme Court in J. C. Penney Company vs. Department of Taxation, 298 N. W., 186 and on Basis of an Analysis of the *Separate* Surplus of International Harvester Company.

November 17, 1941. M. M.

[fol. 145] International Harvester Company

Table of Contents

		Page
Exhibit A	Computation of Additional Privilege Dividend Taxes	33
Exhibit B	Determination of Portion of Surplus Attributable to Wisconsin	34
Exhibit B-1	Analysis of Surplus—December 31, 1927 to December 31, 1932 Showing Elimination of Amounts Arbitrarily Taken over from Subsidiary Corporations	35
Exhibit C	Book Income Allocated to Wisconsin	36

3—620

[fol. 146]

EXHIBIT A

International Harvester Company

Computation of Additional Privilege Dividend Taxes

Date Declared	Date Paid	Amount of Dividend	Paid From Surplus At	Per Cent Taxable	Amount Taxable	Rate of Tax	Amount of Tax	Tax Previously Paid	Additional Privilege Dividend Tax
10-17-1935	12- 2-1935	$ 1,429,267.00	12-31-34	3.08907	$ 44,151.06	.025	$ 1,103.78	$0	$ 1,103.78
11-21-1935	1-15-1936	1,273,563.90	12-31-35	5.28384	67,293.08	.025	1,682.33	0	1,682.33
1- 6-1936	3- 2-1936	1,429,267.00	12-31-35	5.28384	75,520.18	.025	1,888.00	0	1,888.00
2-20-1936	4-15-1936	1,273,565.10	12-31-35	5.28384	67,293.14	.025	1,682.33	0	1,682.33
4-16-1936	6- 1-1936	1,429,267.00	12-31-35	5.28384	75,520.18	.025	1,888.00	0	1,888.00
5-21-1936	7-15-1936	1,273,565.10	12-31-35	5.28384	67,293.14	.025	1,682.33	0	1,682.33
7-16-1936	9- 1-1936	1,429,267.00	12-31-35	5.28384	75,520.18	.025	1,888.00	0	1,888.00
7-24-1936	10-15-1936	6,792,347.20	12-31-35	5.28384	358,896.76	.025	8,972.42	0	8,972.42
10-15-1936	12- 1-1936	1,429,267.00	10-31-36	5.80245	82,932.50	.025	2,073.31	0	2,073.31
11-19-1936	1-15-1937	2,653,288.94	10-31-36	5.80245	153,955.76	.025	3,848.89	0	3,848.89
1-21-1937	3- 1-1937	1,429,267.00	10-31-36	5.80245	82,932.50	.025	2,073.31	0	2,073.31
2-18-1937	4-15-1937	2,653,291.90	10-31-36	5.80245	153,955.94	.025	3,848.90	0	3,848.90
4-15-1937	6- 1-1937	1,429,267.00	10-31-36	5.80245	82,932.50	.025	2,073.31	0	2,073.31
5-20-1937	7-15-1937	2,653,293.96	10-31-36	5.80245	153,956.06	.025	3,848.90	0	3,848.90
7-15-1937	9- 1-1937	1,429,267.00	10-31-36	5.80245	82,932.50	.025	2,073.31	0	2,073.31
8-19-1937	10-15-1937	9,021,136.12	10-31-36	5.80245	523,446.91	.025	13,086.17	0	13,086.17
		$39,028,188.22			$2,148,532.39		$53,713.29	...	$53,713.29

[fol. 147] EXHIBIT B

International Harvester Company (Separate)

Determination of Portion of Surplus Attributable to Wisconsin

	Total Surplus	% to Wisconsin	Wisconsin Surplus	References
Balance December 31, 1930	$ 2,339,122.28		$	
Income 1931	23,551,959.82	None		*
Transferred from Reserves	11,000,000.00	5.88639	647,502.90	1930 Per Cent
Dividends Paid	16,758,909.50	2.01007	336,865.81	
Balance December 31, 1931	$15,453,928.04	2.01008	$ 310,637.09	
Income 1932	3,642,580.13	None		*
Transferred from Reserves	10,000,000.00	5.88639	588,639.00	1930 Per Cent
Dividends Paid	12,046,378.22	2.01008	242,151.89	
Balance December 31, 1932	$17,049,629.95	3.85418	$ 657,124.20	
Income 1933	5,465,321.95	None		*
Transferred from Reserves	10,000,000.00	5.88639	588,639.00	1930 Per Cent
Dividends Paid	8,242,005.47	3.85418	317,661.73	
Balance December 31, 1933	$24,272,946.43	3.82360	$ 928,101.47	
Income 1934	11,011,230.90		250,526.98	(See Attached Ex. C)
Transferred from Reserves	2,500,000.00)	5.88639	58,863.90	1930 Per Cent
Transferred to Reserves	3,500,000.00)			
Dividends Paid	8,264,040.00	3.82360	315,983.83	
Balance December 31, 1934	$26,020,137.33	3.08907	$ 803,780.72	
Income 1935	25,001,516.03		1,697,558.93	(See Attached Ex. C)
Dividends Paid	8,864,824.20	3.08907	273,340.62	
Balance December 31, 1935	$42,156,829.16	5.28384	$2,227,499.03	
Income 1936	18,948,047.35		1,233,531.41	(See Attached Ex. C)
Transferred from Reserves	25,148,073.76)	5.88639	8,116.95	1930 Per Cent
Transferred to Reserves	25,010,180 21)			
Dividends Paid	16,250,567.34	5.28384	860,239.13	
Balance October 31, 1936	$44,962,202.72	5.80245	$2,608,908.26	

* No income was taxed in Wisconsin in 1931, 1932, or 1933, therefore, no book income has been allocated to Wisconsin in any of these years.

[fol. 148]

EXHIBIT B-1

International Harvester Company

Analysis of Surplus—December 31, 1927 to December 31, 1932 Showing Elimination of Amounts Arbitrarily Taken Over From Subsidiary Corporations

	I. H. Co.	Subsidiaries	Total
December 31, 1927	$51,022,748.37	$.....	$51,022,748.37
Net Profit 1928	19,837,576.54	.....	19,837,576.54
Charge to Export Co.	269,119.64	.....	269,119.64
Dividends Paid	17,030,752.12	.....	17,030,752.12
Transferred to C/S account	66,137,770.00	.....	66,137,770.00
Transferred from Subsidiaries	.....	14,491,356.67	14,491,356.67
December 31, 1928	$12,039,077.57	$14,491,356.67	$ 2,452,279.10
Net Profit 1929	20,377,852.64	.....	20,377,852.64
Dividends Paid	16,465,629.13	.....	16,465,629.13
Transferred to Subsidiaries	.....	14,491,356.67	14,491,356.67
Transferred from Subsidiaries	.....	12,934,431.52	12,934,431.52
December 31, 1929	$ 8,126,854.06	$12,934,431.52	$ 4,807,577.46
Net Profit 1930	22,456,899.23	.....	22,456,899.23
Dividends Paid	16,669,167.45	.....	16,669,167.45
Transferred to Subsidiaries	.....	12,934,431.52	12,934,431.52
Transferred from Subsidiaries	.....	14,735,291.48	14,735,291.48
December 31, 1930	$ 2,339,122.28	$14,735,291.48	$12,396,169.20
Net Profit 1931	23,551,959.82	.....	23,551,959.82
Transferred from Reserves	11,000,000.00	.....	11,000,000.00
Dividends Paid	16,758,909.50	.....	16,758,909.50
Transferred to Subsidiaries	.....	14,735,291.48	14,735,291.48
Transferred from Subsidiaries	.....	9,685,759.28	9,685,759.28
December 31, 1931	$15,453,928.40	$ 9,685,759.28	$23,139,687.32
Net Profit 1932	3,642,580.13	.....	3,642,580.13
Transferred from Reserves	10,000,000.00	.....	10,000,000.00
Dividends Paid	12,046,878.22	.....	12,046,878.22
Transferred to Subsidiaries	.....	9,685,759.28	9,685,759.28
Transferred from Subsidiaries	.....	.....	.....
December 31, 1932	$17,049,629.95	$.....	$17,049,629.95

[fol. 149] EXHIBIT C

International Harvester Company

Book Income Allocated to Wisconsin

	1934	1935	1936
Net Income per Books	$11,011,230.90	$25,001,516.03	$18,948,047.35
Less Non-Apportionable Income:			
Dividends	$ 8,367,893.83	$ 7,397,810.00	$ 1,999,558.95
Less—I. H. Co. of America	1,500,000.00	5,000,000.00	200,000.00
Macleod & Co.	500,000.00	100,000.00	25,000.00
Steel Department Profit or Loss	667,009.85	2,473,226.66	1,847,656.78
Gains or Losses on Sales of Stocks, Bonds, or other capital assets	7,115.13	943,232.98	282,205.31
Engineering and Research Fees	120,118.16	125,249.18	151,428.90
Interest on Bonds	759,743.80	520,403.53	198,492.96
Royalties	5,052.41	5,155.09	5,718.47
Interest Paid	49,068.79	17,664.88	37,591.65
Total Non-apportionable	$ 7,863,634.13	$ 4,460,946.60	$ 3,649,959.10
Apportionable Income	$ 3,147,596.77	$20,540,569.43	$15,298,988.25
Ratios to Wisconsin*	7.95931	8.26442	8.06283
Income to Wisconsin	$ 250,526.98	$ 1,697,558.93	$ 1,233,531.41

* From Wisconsin Audit Report 1931 to 1936, Amended Exhibit B-1.

[fol. 150] BEFORE WISCONSIN BOARD OF TAX APPEALS

Docket D-5

Privilege Dividend Tax Appeal

INTERNATIONAL HARVESTER COMPANY

vs.

WISCONSIN DEPARTMENT OF TAXATION

SUPPLEMENTARY STIPULATION OF FACTS—Filed December 23, 1941

This Stipulation of Facts is supplementary to the Stipulation of Facts executed by the parties to the above Privilege Dividend Tax Appeal on September 20, 1941.

The parties hereby stipulate that during the period from September 26, 1935 to October 15, 1937, the International Harvester Company had more than 32,000 stockholders residing in every State of the United States and many

foreign countries, of whom less than 2% resided in the State of Wisconsin.

Dated December 23rd, 1941.

R. M. Stroud, Attorneys for Appellant International Harvester Company, Richard R. Teschner, Attorney for Appellee Wisconsin Department of Taxation.

[fol. 151] BEFORE WISCONSIN BOARD OF TAX APPEALS

Docket No. D-5

INTERNATIONAL HARVESTER COMPANY, a New Jersey Corporation, Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

DECISION AND ORDER—Filed February 13, 1942

This is an appeal by the petitioner from an assessment of privilege dividend taxes resulting from the respondent's audit of dividend payments made by the petitioner during the period from September 26, 1935 to October 15, 1937, inclusive.

From the stipulations presented and the record before us, we make the following findings of fact: The petitioner is a corporation organized under the laws of the State of New Jersey. Its principal office is in Hoboken. During the period under review, its general offices have been located in Chicago, Illinois. The petitioner does business in every state of the United States except Nevada. Since [fol. 152] 1920, the petitioner has had a manufacturing plant and selling branches in Wisconsin. No directors' meetings are held in this state. The meetings at which the dividends in question were declared, and all acts and proceedings with respect to the declaration and payment of such dividends, occurred at Chicago.

Dividends on its common stock are paid in quarterly installments on the 15th day of January, April, July, and October, and dividends on preferred stock are paid in March, June, September, and December.

During the period here involved, the petitioner had more than 32,000 stockholders residing in every State of the

United States and many foreign countries, of whom less than 2% resided in Wisconsin.

On December 2, 1937, the respondent levied an additional assessment against the petitioner in the sum of $68,838.49, exclusive of penalties and interest. Thereafter the Wisconsin Supreme Court, on remand from the United States Supreme Court, rendered its decision in *J. C. Penney Co. vs. State of Wisconsin, et al.*, 298 NW 186 (reversing 233 Wis. 286). Subsequent to the decision therein, the respondent recomputed the amount of privilege dividend taxes, and under date of September 22, 1941, prepared an [fol. 153] audit report setting forth its recomputation of the petitioner's liability for additional privilege dividend taxes. This later recomputation was supplemented by one dated November 17, 1941, in which the petitioner's separate surplus was analyzed and a computation of privilege dividend taxes made with reference to such separate surplus.

The analysis of surplus and the determination of the portion of the dividends paid by the petitioner out of its surplus attributable to Wisconsin earnings, as well as the mathematical computation of the privilege dividend taxes thereon, are not here disputed.

Following the petitioner's receipt of notice of the assessment of additional privilege dividend taxes (under date of December 2, 1937), the petitioner protested the proposed assessment and requested a hearing thereon. This appeal was pending with the Tax Commission at the time that Chapter 412, Laws of 1939, was passed, and pursuant to the provisions of that Act, the within appeal was transferred to this Board.

The following question is presented for determination: Is the method of computation employed by the respondent for the purpose of computing the privilege dividend taxes due, by virtue of Section 71.60, Section 3, upon dividends declared and paid by the petitioner out of income derived [fol. 154] from property located and business transacted in this state, valid?

The Wisconsin statutes involved are:

Section 71.60:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business

transacted in this state, there is hereby imposed a tax equal to three per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1941. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation,

" • • •

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

[fol. 155] The respondent's computation of additional privilege dividend taxes is based upon the presumption that the petitioner paid its dividends from Wisconsin income in the proportion that its earnings from Wisconsin property and business, reflected in its surplus, bore to its total surplus.

The petitioner predicates its contention that the privilege dividend taxes here sought to be imposed by the respondent are invalid upon its conclusion that Section 71.60, Section 3, gives no right to this State to tax dividends from prior years' income. It further maintains that said Section grants to the State the right to tax only dividends from current income which, in the absence of proof to the contrary, is presumed to be the same as the income for the

year immediately preceding and does not permit the taxation of dividends from surplus.

Our study of the Court's decision in *J. C. Penney*, supra, (May 20, 1941) convinces us that the respondent's method of computation of additional privilege dividend taxes set forth in Exhibit 7A complies with the statutory requirements (Section 71.60, Section 3), and is in conformity with the construction of that Statute as given to it by the Wisconsin Supreme Court. The applicable portion of the de- [fol. 156] cision in that case declares:

> "• • • The Wisconsin earnings and earnings for particular calendar years were not segregated and had lost their identity long before the dividends here involved were paid. It is the contention of the taxpayer that the presumption created by the statute (1) is invalid and (2) has been rebutted. The taxpayers' contention requires us to consider the nature of the presumption. By its terms it operates only in the absence of evidence. Its effect is to require the taxpayer to go forward with the evidence. When evidence is introduced which rebuts it the presumption ceases to operate because it rests upon no factual basis and takes no account of the way in which the transactions of the Company are actually handled. Being a rebuttable presumption it is clearly within the power of the Legislature to create it. Evidence having been introduced which rebuts it, the controversy must be determined upon general principles of law. It is obvious from a consideration of the facts that the so-called 'trust fund' doctrine has no application to the facts in this case. The earnings of the corporation are in no sense held by it in trust for the taxing authorities of the state. The earnings are handled according to ordinary business practice. They are not earmarked or segregated or manipulated in any manner whatever. When the corporation declared its dividends in 1936, it drew upon its net assets in excess of its capital (surplus) as required by the law of Delaware. Its net profits for the year 1935 are to be found in its surplus at the end of the calendar year. When the Company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be pre-

sumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for the year 1935 but to the whole amount of the surplus * * *."

[fols. 157-158] The argument advanced by the petitioner with respect to the respondent's authority to levy a tax upon dividends paid out of earnings derived prior to the effective date of the privilege dividend tax law is disposed of, in our judgment, by the decision in *J. C. Penney*, supra.

We find that the method of computation (set forth in Exhibit 7A), which the respondent used in determining the amount of privilege dividend taxes on dividends declared and paid by the petitioner out of income derived from business transacted and property located within the State of Wisconsin, is proper.

It Is Ordered:

That the additional assessment appealed from, as modified and amended by the recomputation of November 17, 1941, be and the same is hereby affirmed.

Dated at the State Capitol, Madison, Wisconsin, this 13th day of February, 1942.

Wisconsin Board of Tax Appeals, G. L. Broadfoot, Chairman; W. J. Conway, Harry Slater.

[fol. 159] In Circuit Court of Dane County, State of Wisconsin

No. —

International Harvester Company, Petitioner,

vs.

Wisconsin Board of Tax Appeals, Respondent

Petition on Appeal—March 12, 1942

To the Honorable Judge of the Circuit Court, County of Dane, State of Wisconsin:

(1) The full name of the Petitioner is International Harvester Company.

(2) This is an appeal from the decision and order of the Wisconsin Board of Tax Appeals, filed February 13, 1942,

with respect to the assessment of additional Wisconsin Privilege Dividend Taxes during the period from September 26, 1935 to October 15, 1937 inclusive. Said decision and order of said Wisconsin Board of Tax Appeals, a copy of which is attached hereto, marked Exhibit A and made a part hereof, is signed by G. L. Broadfoot, Chairman, and W. J. Conway and Harry Slater, members of said Wisconsin Board of Tax Appeals. In said decision and order, dated February 13, 1942, it was ordered: "That the additional assessment appealed from, as modified and amended by the recomputation of November 17, 1941, be and the same is hereby affirmed." Said recomputation of November 17, 1941 showed a total amount of additional Wisconsin Privilege Dividend taxes for said period of $53,713.29, penalty and interest to January 1, 1942 of $16,375.60, or total taxes, penalty and interest of $70,088.89.

(3) The facts upon which the Petitioner relies are as follows:

[fol. 160] (a) The International Harvester Company is a corporation organized September 19, 1918, under the laws of the State of New Jersey. Its principal office is in Hoboken, New Jersey. During the entire period since September 26, 1935, when the Wisconsin Privilege Dividend Tax became effective, the general offices of the International Harvester Company have been located, until October 1937, at 606 South Michigan Avenue, and since then at 180 North Michigan Avenue, Chicago, Illinois.

(b) The International Harvester Company is admitted to do business in every state of the United States except Nevada, and has been so admitted since January 1, 1936. Until December 31, 1935, the products manufactured by the International Harvester Company were distributed in the United States by the International Harvester Company of America, a Wisconsin corporation, all of whose capital stock was owned or controlled by the International Harvester Company, and the International Harvester Company of America operated all the selling branches in Wisconsin and the rest of the United States. Since 1920 the International Harvester Company has had manufacturing plants in Illinois, Indiana, New York, Tennessee, Ohio, Louisiana and in Milwaukee, Wisconsin. It has more than 100 selling branches in the United States. In the State of

Wisconsin it has selling branches in Milwaukee, Madison, Eau Claire and Green Bay. After December 31, 1935, except in Wisconsin, said products manufactured by the International Harvester Company were distributed by the branches of the International Harvester Company, and since October 31, 1939, all the branches in the United States have been owned and operated by the International Harvester Company. In the last fifteen years there have been [fol. 161] more than 100 selling branches in the United States.

(c) The executive offices of the International Harvester Company are located at its general offices in Chicago, Illinois. The heads of its various departments, Executive, Manufacturing, Sales, Purchasing, Treasury and other departments are all located and conduct their business at its general offices in Chicago, Illinois. The executive policies of the Company are determined by its officers in said general offices in Chicago, Illinois; the purchasing of supplies for its manufacturing plants, and the manufacturing orders on the manufacturing plants are issued from the general offices in Chicago, and the general policies of the Company there determined. The directors' meetings are held at the general office of the Company in Chicago, Illinois, and always have been so held. No directors' meetings have ever been held in the State of Wisconsin. The facts set forth in this paragraph have been true for the entire history of the Company since September 19, 1918.

(d) Sales by the selling branches are made both for cash, and partly for cash and notes. All cash received by the selling branches and the proceeds of all notes when paid are deposited by the selling branch in its Deposit Account. Funds in the Deposit Account of a branch cannot be drawn on by the branch, but only by the office of the Treasury Department in Chicago, which regularly at fixed intervals draws out the money in the Deposit Account into the Treasury Department in Chicago. Likewise, receipts from all other operations or business of the Company and of its subsidiaries have been deposited in the Company's bank accounts located in Chicago, Illinois, and there commingled without segregation or ear-marking of any kind [fol. 162] with the general funds of the Company. The statements above made apply for the entire period covered

by said audit, namely from September 26, 1935 to October 15, 1937 inclusive.

(e) Section 14:8-19 of Revised Statutes of New Jersey 1937 provides as follows:

> "The directors of a corporation shall not pay dividends except from its surplus, including surplus as determined by section 14:8-6 of this title, or from the net profits arising from the business of the corporation, nor shall they divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of the corporation or reduce its capital stock except as authorized by law."

Said Section 14:8-6 provides that the capital of a corporation with no par stock may be increased by resolution of the Board of Directors, directing that a portion of the surplus be transferred to capital account, and that the Board of Directors may direct that the surplus so transferred may be treated as capital, in respect of any share without nominal or par value.

Dividends on the common stock of the International Harvester Company are paid in quarterly installments on the 15th days of January, April, July and October of each year. Dividends on preferred stock of the Company are paid in quarterly installments on March 1st, June 1st, September 1st and December 1st of each year.

The form of resolutions for common stock dividends, effective in the period from September 26, 1935 to and including the dividend paid October 15, 1937, was according to the form of which the following is a sample:

> "The recommendation of the Executive Committee that a quarterly dividend of sixty-two and one-half cents (62½¢) per share on the common stock of the Company be paid July 15, 1937, to all holders of record of common stock of the Company at the close of business on June 19, 1937, having been considered and [fol. 163] the Comptroller having submitted a statement showing the surplus account at May 19, 1937, before adding profits that have accrued since October 31, 1936, and the Board having considered the same and also the current earnings and the present and probable future cash demands and resources of the Company's business.

"On motion, duly made and seconded, the following resolution was unanimously adopted:

"Resolved, That there be paid on July 15, 1937, to all holders of record of common stock of the Company at the close of business on June 19, 1937, a quarterly dividend of sixty-two and one-half cents (62½¢) per share on the common stock of the Company."

Preferred stock dividends in the period from September 26, 1935 to October 31, 1937 were declared by resolutions of which the following is a sample:

"The Comptroller having submitted a statement showing the surplus account at April 15, 1937, before adding profits that have accrued since October 31, 1936, and the Board having considered the same and also the current earnings and the present and probable future cash demands and resources of the Company's business,

"On motion, duly made and seconded, the following resolution was unanimously adopted:

"Resolved, That a dividend of One Dollar and Seventy-five Cents ($1.75) per share, being the seventy-fifth quarterly dividend, be paid on June 1, 1937 to all holders of record of the preferred stock of this Company at the close of business on May 5, 1937."

(f) The meetings of the Board of Directors at which all the dividends in question have been declared, and all acts and proceedings in respect of the declaration and payment of such dividends, have taken place at the Company's office in the City of Chicago, Illinois, the dividends having been paid by the Company's Treasury Department by checks drawn on the Company's bank accounts representing its general funds on deposit in Chicago and New [fol. 164] York City, and mailed to its many stockholders. Such dividends have not been charged against the earnings or profits of the Company of any particular class or period, but have been charged against the surplus of the Company, which resulted from and reflected the accumulated net profits and income of the Company from its entire business wherever transacted. During the period from September 26, 1935 to October 23, 1940, both inclusive, the International Harvester Company had more than 32,000 stock-

holders residing in every state of the United States and in many foreign countries, of whom less than 2% resided in the State of Wisconsin.

(4) Petitioner's objections to the determination appealed from and the contentions of law upon which petitioner relies are as follows:

(a) The Wisconsin Privilege Dividend Tax is not an additional tax on income, but is a tax on the privilege of declaring and receiving dividends. The Petitioner contends, however, that the privilege of declaring dividends is not exercised in Wisconsin, and the privilege of receiving dividends is not exercised in Wisconsin in the case of more than 98% of its stockholders.

(b) The Wisconsin Privilege Dividend Tax is levied on the business of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin. The Petitioner contends, however, that the dividends of the International Harvester Company are not paid out of income, but are paid out of surplus as of the end of the year prior to the date of declaration of the dividend.

(c) Under the Wisconsin Privilege Dividend Tax no [fol. 165] right is given to tax dividends from income of prior years. The statute gives the right to tax dividends only from current income which, in the absence of proof to the contrary, is presumed to be the same as the income for the year immediately preceding. If that presumption is rebutted, the statute gives no right to tax income from prior years. It gives the right to tax only income of the current year which, in the absence of proof to the contrary, is presumed in the case of corporations doing business in and out of Wisconsin to be the same as income for the current year. The Petitioner contends, therefore, that it is current year income which is to be taxed, and therefore that the statute gives no right to tax dividends derived from surplus which is income of prior years.

(d) The statute gives no right to tax dividends derived from income of any year before the Privilege Dividend Tax took effect on September 26, 1935, and accordingly gives no right to tax dividends paid out of surplus accumulated prior to September 26, 1935.

(5) Petitioner does not admit that any portion of the additional assessment appealed from of Wisconsin Privilege Dividend Taxes, penalty and interest, as modified and amended by the recomputation dated November 17, 1941, is due.

(6) In accordance with the provisions of Section 71.10 (6)(a) of the Wisconsin statutes, Petitioner elected to deposit the entire amount of the additional taxes herein appealed from, together with interest thereon, with the State Treasurer, and the Wisconsin Department of Taxation issued its certificate to the said State Treasurer, authorizing him to accept payment of such taxes, together with interest thereon to the first day of the succeeding month and to give [fol. 166] his receipt therefor. This payment has been made and the State Treasurer's receipt has been issued therefor under date of January 3, 1942.

(7) Petitioner prays that its appeal from said additional assessments of Wisconsin Privilege Dividend Taxes and interest be granted, and that the assessments under review be modified to state that there is no Wisconsin Privilege Dividend Tax due from said International Harvester Company to the State of Wisconsin, and that the Treasurer of the State of Wisconsin be directed to refund to said International Harvester Company said amount of $70,088.89 on account of Wisconsin Privilege Dividend Taxes penalty and interest, together with interest on the said amount of $70,088.89 from the date of payment thereof.

March 12, 1942.

Respectfully submitted, International Harvester Company, Petitioner. By A. B. Keller, Vice President, R. M. Stroud, Edward R. Lewis, Its Attorneys.

[fol. 167] IN CIRCUIT COURT OF DANE COUNTY

INTERNATIONAL HARVESTER COMPANY, Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

Before Hon. Alvin C. Reis, Judge

DECISION—August 14, 1942

BY THE COURT:

This is an appeal from a decision and order of the Wisconsin Board of Tax Appeals assessing additional "privilege dividend" taxes against appellant for the period September 26, 1935 to October 15, 1937 in the sum (including interest and penalties) of approximately $70,000.00.

Appellant International Harvester Company is a corporation organized in 1918 under the laws of the State of New Jersey, with its principal office at Hoboken, N. J. The general offices are in Chicago.

This concern is admitted to do business in every state of the union except Nevada. Products of this corporation are nationally known and nationally sold, which is a fact of common knowledge.

No meetings of the directors of the corporation have ever been held in Wisconsin. These meetings always have been held in Chicago. It necessarily follows that the declaration of dividends by the corporation is an act which has occurred only in the State of Illinois and never in the State of Wisconsin.

Of the company's 32,000 stockholders, *ninety-eight per cent* are *non-residents* of Wisconsin, according to the stipulation filed herein.

Upon this basis, the first challenge in the pending lawsuit is to the applicability of Wisconsin's dividend tax law [fol. 168] to this particular foreign corporation.

Literally, the statute itself does not apply.

Sec. 71.60 (3)(1) provides:

"*For the privilege of declaring and receiving dividends,* out of income derived from property located and business transacted in this state, there is imposed a tax. . . ." (Our italics).

"Declaring and receiving."

This corporation does not *declare* its dividends in Wisconsin nor do 98% of its stockholders *receive* dividends in Wisconsin.

Hence, it is argued, the statute does not apply.

Counsel for the appellant however do not expect this court to be so naive as to assume that the challenge is to the mere inapplicability of the statute. The situation in the J. C. Penney case was one of a foreign corporation, declaring dividends *outside* of the state to stockholders located *out* of the state. Yet in that litigation the Penney company finally was beaten.

> State of Wisconsin v. J. C. Penney Company, 311 U. S. 435, 85 L. ed. 267.

The International Harvester Company is not asking us to hold simply that the statute does not apply to it. In substance, it is re-opening and submits that we are entitled to re-open the entire mooted question of the *constitutionality* of the privilege dividend tax law as affecting foreign corporations.

The Supreme Court of Wisconsin, in a 6 to 1 decision, held it unconstitutional, Mr. Justice Fowler dissenting.

> J. C. Penney Company v. Tax Commission, 233 Wis. 286.

The Supreme Court of the United States, in a 5 to 4 decision, held it constitutional, Mr. Chief Justice Hughes, Mr. Justice Roberts, Mr. Justice McReynolds and Mr. Justice Reed dissenting.

> State of Wisconsin et al. v. J. C. Penney Company, 311 U. S. 435, 85 L. ed. 267.

The majority opinion of the Wisconsin court was written by Mr. Chief Justice Marvin B. Rosenberry.

[fol. 169] The majority opinion of the United States court was written by Mr. Justice Felix Frankfurter.

Upon remand from the court at Washington, the Supreme Court of Wisconsin again considered the nature and application and constitutionality of the tax. Mr. Chief Justice Rosenberry again wrote the opinion, which this time was unanimous.

> J. C. Penney Company v. Tax Commission, 238 Wis. 69.

We agree with counsel for the International Harvester Company that an immaculate dilemma has been created.

In the first Penney case the Supreme Court held the tax to be a transaction tax or tax on "privilege", as in terms it so states; and since the transaction happened and the privilege was exercised outside of Wisconsin, in the case of a foreign corporation such as this one, the Wisconsin court held the tax unconstitutional, being violative of due process.

When however this case reached the Supreme Court of the United States, that tribunal regarded this tax as a "supplementary income tax" upon the corporation and hence clearly within the power of the state to impose and not infringing upon the fourteenth amendment.

In the third and final round of the battle thus far, i. e., remand from the United States Supreme Court to the Wisconsin court, our local court followed the United States Supreme Court upon the issue of constitutionality *because it had to do so.* That pithes a delicate point rather abruptly but no one will question the accuracy of our assertion.

The Supreme Court of Wisconsin however, in this last decision, refused to recede from its former position that this was an excise or privilege tax. It militantly maintained that it was its right, and its alone, to say what this tax was; and that such was not the province of the Supreme Court of the United States. And thereupon and in the face [fol. 170] of the highest federal court declaration that the tax here involved was a "supplementary income tax" upon the corporation, the Wisconsin court unequiov-ally declared: "*In no sense and to no extent whatever, is it a tax upon the income of the corporation.*" (Our italics).

J. C. Penney Company v. Tax Commission, 238 Wis. 69, 73.

We can not settle this dispute. That rests far beyond our hands.

The Wisconsin court insists that the tax is a transaction tax, which under the federal constitution makes it unconstitutional because based on out-of-state transactions. But the United States court majority opinion disregards it as a transaction tax and sets the tax up as an additional corporate income tax, the validity of which is obvious.

The Supreme Court of Wisconsin, as noted, however, will not accept it as an income tax on the corporation. Furthermore, it postulates that if it is an income tax on individuals,

it is unconstitutional *under the state constitution,* because the individuals are beyond the jurisdiction of Wisconsin to tax.

"It is perfectly true that the tax cannot be sustained as an income tax under the law of this state."—Thus spoke our own Supreme Court.

J. C. Penney Company v. Tax Commission, 238 Wis. 69, 72.

Therefore, as an income levy, the tax is completely *persona non grata* in this state,—an unwanted black sheep in the Wisconsin court's backyard.

Here then is the deadlock: If the tax is a transaction tax, as Wisconsin's court says it is, then it is void under the *federal* constitution; and the federal court should so hold it. If on the other hand it is an income tax, it can be an income tax only on individuals, according to the Wisconsin [fol. 171] court, and then it becomes void under the *state* constitution; and the state court should so hold it.

One living *fact* however sticks out in this mesh of speculation and expectation and of controversy. And that existing fact controls the Circuit Court for Dane County until the time, if any, when one of the higher courts changes its conclusion as to what this law is.

That salient fact is that both courts—federal supreme and state supreme—*so far* hold the law to be valid.

Whatever may be the refinements of difference as to meaning or designation of the tax, and serious as may be the clash of legal conceptions that *ultimately* may destroy it, the record thus far indicates that the tax must be accepted by lower courts as a valid tax, even as against a foreign corporation declaring its dividends out of the state to stockholders out of the state.

The Supreme Court of the United States *reversed* the decision of the Supreme Court of Wisconsin which had held the tax unconstitutional. That is the record in the federal court.

The Supreme Court of Wisconsin, upon remand, regardless of its frank and emphatic disagreement with the United States court upon the theory of the tax, concludes succinctly:

"It is held that the statute is valid; that the State of Wisconsin has jurisdiction to levy the tax * * *."

J. C. Penney Company v. Tax Commission, 238 Wis. 69, 79.

The next ground for the appeal herein is the alleged unsoundness of the method employed by the Department of Taxation, sustained by the Board of Tax Appeals, in computing the tax. To adopt appellant's own construction of what respondent have done: "Basically in the computation of the tax as affirmed by the Board of Tax Appeals, the Department has attempted to analyze the surplus on the December 31st of the year preceding the year in which a particular dividend is paid, in an alleged attempt to determine the percentage of Wisconsin income in surplus at that time." (Appellant's brief, pp. 5-6).
[fol. 172] Sec. 71.60 (3) (4) reads:

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. *In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend.* If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state." (Our italics).

Appellant argues that it has successfully shown that dividends were not paid out of *earnings* attributable to Wisconsin for the immediately preceding year but rather out of its general surplus. Hence, the presumption stated in the foregoing statutory clause, is said to be rebutted; and plainly it is.

The question, as we see it, then becomes: If the presumption of payment out of preceding year's earnings is rebutted, what test may or must the Department of Taxation apply?

Certainly it is not intended that there shall be a gap and that if the presumption is rebutted, there shall be no tax. Yet this in essence is the effect of appellant's argument.

Incidentally, it strikes us that the legislature has proceeded with artificiality in making the basic assumption that dividends customarily are paid out of earnings of the immediately preceding year. We had thought that ordinarily they were paid out of surplus. In predicating the presumption that dividends are paid out of one year's earnings, namely those of the year most recently past, rather than out of the accumulated surplus—unless proven to the contrary—the legislators have visualized the cart before the horse; but perhaps for reasons sufficient to themselves.

Appellant's objection herein is that, the presumption being frustrated, our tax authorities went ahead and determined the portion of the dividend paid out of surplus de- [fol. 173] rived from Wisconsin (using the surplus figure as of the close of the preceding fiscal year). This, it is pointed out, is the method prescribed by 71.60 (3) (4) for a *loss;* and appellant contends that there being no loss but, on the contrary, a profit, then—under the maxim, *enumeratio unius est exclusio alterius*—the tax people have done just what the legislature inferentially said they could not do in the case of a profit.

This presents a fascinating problem, were it not for the circumstance that the Supreme Court of Wisconsin has given sanction to the formula utilized by the Department of Taxation. With that sanction before us, we can not very well pick the mechanics to pieces for theoretical reasons.

Upon remand in the Penney case, the Supreme Court said (J. C. Penney v. Tax Commission, 238 Wis. 69, 78-79):

"When the corporation declared its dividends in 1936, it drew upon its net assets in excess of its capital (surplus) as required by the law of Delaware. *Its net profits for the year 1935 are to be found in its surplus at the end of the calendar year. When the company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be presumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for the year 1935 but to the whole amount of the surplus.* The Tax Commission treated the matter as if the statutory presumption were conclusive and gave no weight or consideration to the evidence. In

this the Tax Commission was in error. It is said in briefs of counsel that it would be a Herculean task to compute the amount of surplus attributable to Wisconsin income. Inasmuch as the basis upon which the supreme court of the United States sustained the tax is that some part of the dividend is allocable to Wisconsin income, we see no escape from the conclusion that no tax can be levied until that fact is ascertained." (Our italics).

That the Department of Taxation in the present case has acted in pursuance of Mr. Chief Justice Rosenberry's analysis, is not and can not be disputed by appellant.

On page 11 of the brief by appellant's attorneys, they say: "There is no such thing as a Wisconsin surplus. It is therefore a gratuitous assumption, unwarranted under the statute, to declare that when the company pays a dividend, it draws on Wisconsin earnings in the proportion that [fol. 174] Wisconsin earnings reflected in surplus bear to its total surplus."

On page 4 of the reply brief by appellant's attorneys, they say: "The only manner in which it can be said that the dividend, which was actually paid out of surplus, was partially paid out of Wisconsin earnings reflected in surplus, is to adopt a new fiction in lieu of the rebutted statutory fiction."

These comments might constitute a well-des-rved rebuke to the Department of Taxation, were it not for the fact that the opinion of Mr. Chief Justice Rosenberry, evidently concurred in by all the justices, points the way to what appellant calls the "unwarranted" assumption and "new fiction".

If the merits need be considered, which they need not, since the Chief Justice and the court have spoken;

Why is it not completely logical to state, as Mr. Chief Justice Rosenberry did, that when the corporation drew upon surplus containing Wisconsin income, it drew upon Wisconsin income to the extent of the proportion of that income to the whole amount of the surplus?

Moreover, as we have intimated, if this foundation is not built upon, then upon what can the Department of Taxation construct any tax whatever? And surely because a presumption is rebutted, it should not be contemplated that the bottom drops out of the tax bucket.

We repeat: Appellant's position renders the whole dividend tax nugatory. Bluntly its attorneys state (p. 7, reply brief): "Finally, there is not a word in the statute which says that a dividend paid out of surplus can be taxed. The statute provides for taxing only dividends paid out of income."

If this is the end result of Wisconsin's dividend tax law, then that law is a dead letter, not only as to foreign corporations *but as to domestic corporations as well,* which [fol. 175] declare dividends out of surplus. And we know that corporations do declare dividends out of surplus. A second-year law school student knows that. The law of corporations just about requires it, both as to a New Jersey corporation such as appellant and as to a Wisconsin corporation.

Section 14: 8-19, Revised Statutes of New Jersey 1937, provides:

"*The directors of a corporation shall not pay dividends except from its surplus,* including surplus as determined by section 14: 8-6 of this title, or from the net profits arising from the business of the corporation. * * *" (Our italics).

Sec. 182.19 (1), Wisconsin statutes, reads:

"No dividend shall be paid by any corporation until at least fifty per cent of the authorized capital stock has been fully paid in, *and then only out of net profits properly applicable thereto* * * *"

We grant that appellant has an academic argument to the effect that it has rebutted the presumption that dividends were paid out of the preceding year's earnings and that the statute does not call for a tax on dividends declared out of surplus, *eo nomine.*

But in that event, what was the sense in carrying the issue of *constitutionality* in the first Penney case to the Supreme Court of the United States? The whole matter could have been stopped in its tracks by a decision of the Wisconsin court that the statute does not tax dividends declared out of surplus.

What was the purpose of the Supreme Court of Wisconsin in the second Penney case in sending the case back to the Department of Taxation for a re-computation, if the law does not tax a dividend declared out of surplus? Our Supreme Court knew that the dividend of J. C. Penney Com-

pany was declared out of *surplus*. The entire second phase of its opinion was devoted to that very proposition. (238 Wis. 69, 74-79).

To now propound, as appellant does, that a dividend out of surplus is not taxable at all, is to accuse the legislature of futility and the Supreme Court of a glaring oversight.

[fol. 176] Appellant's incidental criticism in this regard is that the Department of Taxation should not have used surplus *as of December* 31st of the year preceding. Appellant submits directors' resolutions which purportedly recognize something in the form of a current or daily surplus, e. g., "surplus account at April 15, 1937."

This approaches the hyper-critical. Common business sense dictates that surplus figures may be taken as of the close of the year. One cannot mark a surplus sheet like the milk man's morning card.

Finally, appellant protests of the retroactivity of the computation. That is, this surplus is an accrual from the year 1918. It can not be segregated as to time. *Ergo*, says appellant, this surplus allocation method must be erroneous to the extent that it presupposes surplus accretions *before* Wisconsin's dividend tax law ever went into effect, which was September 26, 1935. Erroneous, because appellant argues, the taxpayer had met all of Wisconsin's requirements as to income earned prior to that date and could not constitutionally have thrust upon it an additional burden upon that income—citing the dissenting opinion of Mr. Justice Roberts in the Penney case.

This argument is a throw-back to the original dilemma herein described. If the tax is geared to income, then it is arguable that we are faced with a prodigiously retroactive income tax. On the other hand, if the tax is a transaction tax, then the argument mis-fires; for the *transaction* is a present one, to-wit, the immediate declaration of the dividend; and the hoary surplus is but one component in the equation by which to gauge the final quantum of the tax.

We respectfully leave that residuum of the dilemma where it belongs: To our colleagues on the Supreme Court of Wisconsin and the Supreme Court of the United States.

The Attorney General may prepare and submit to appellant's attorneys the order and judgment affirming the decision and order of the Board of Tax Appeals.

Dated August 14, 1942. (10)

[fol. 177] IN CIRCUIT COURT OF DANE COUNTY

INTERNATIONAL HARVESTER COMPANY, Petitioner

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

JUDGMENT—September 17, 1942

The above proceeding commenced by the International Harvester Company, a New Jersey corporation, pursuant to the provisions of sec. 73.015 Wis. Stats. 1941, to review the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942 modifying, and affirming as so modified, an additional assessment of Wisconsin privilege dividend taxes against said International Harvester Company, for the period September 26, 1935 to October 15, 1937, inclusive, having been heard before the Court on the record made before the Wisconsin Board of Tax Appeals in accordance with the provisions of sec. 73.015 (5) Wis. Stats. 1941, R. M. Stroud of Madison, Wisconsin and Edward R. Lewis of Chicago, Illinois, appearing for the petitioner International Harvester Company and John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General appearing for the respondent, and the Court, after hearing the arguments of counsel, reading the briefs submitted, and fully considering the case, having rendered a written opinion dated August 14, 1942, and entered an order directing judgment affirming the said additional assessment as modified, and affirmed as so modified, by the said decision and order of the Wisconsin Board of Tax Appeals, and confirming the said decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942; and

[fols. 178-179] Notice of application for the entry hereof having been duly waived in writing by the attorneys for the petitioner International Harvester Company, on motion of John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General,

It is hereby ordered and adjudged that the additional assessment of privilege dividend taxes against the International Harvester Company, a New Jersey corporation, for the period September 26, 1935 to October 15, 1937, inclusive, as modified and affirmed as so modified, by the

decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942 is hereby affirmed; and

It is hereby further ordered and adjudged that the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942, modifying, and affirming as so modified, the said additional assessment of privilege dividend taxes against the International Harvester Company, a New Jersey corporation, is hereby confirmed in all respects; and

It is hereby further ordered and adjudged that the respondent, Wisconsin Department of Taxation have and recover of the said International Harvester Company the sum of ($——) costs (balance of unpaid clerk's fees to be taxed and inserted herein by the Clerk if the same are not paid by the petitioner International Harvester Company).

Dated at Madison, Wisconsin this 17th day of September, 1942.

By the Court (Signed) Alvin C. Reis, Circuit Judge.

[fol. 180] IN SUPREME COURT OF WISCONSIN

EXCERPTS FROM APPELLANT'S BRIEF

Proposition "II" at page 30:

"II

Taxation without jurisdiction is a denial of due process, and a privilege or excise tax cannot be levied for the privilege of doing acts which are actually done outside the jurisdiction. Such due process is guaranteed by the Fourteenth Amendment of the Federal Constitution, as well as by the Wisconsin Constitution. The Privilege Dividend Tax Law as here applied, and the taxes assessed thereunder and sustained below, violate such due process and the rights of appellant and of its stockholders under the Federal Constitution."

Proposition "III" at page 33:

"III

The presumption adopted in the assessment in question, namely, that the International Harvester Com-

pany paid its dividends from Wisconsin income in the proportion that its earnings from Wisconsin property and business reflected in surplus, bore to its total surplus, is wholly unauthorized by the statute."

[fol. 181] Proposition "IV" at page 38:

"IV

Where a statute provides a method of allocation and does not clearly grant to the Tax Commission authority to supply a formula in case the statutory formula proves unworkable or unconstitutional in the case of the particular taxpayer involved, the Tax Commission has no authority to supply a formula of its own. The Wisconsin Department of Taxation, therefore, has no authority to apply the formula based on surplus derived from Wisconsin."

Proposition "V" at page 40:

"V

The State of Wisconsin cannot tax any dividend which was derived from earnings accumulated prior to September 26, 1935, when the Wisconsin Privilege Dividend Tax took effect."

[fol. 182] In Supreme Court of Wisconsin

International Harvester Company, Appellant

vs.

Wisconsin Department of Taxation, Respondent

Dane Circuit Court

Minute Entry of Argument and Submission—March 10, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by R. M. Stroud, Esq., and Edward R. Lewis, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, J. Ward Rector, Esq., Assistant Attorney Gen-

eral, and Richard H. Teschner, Esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 183-184] IN SUPREME COURT OF WISCONSIN

INTERNATIONAL HARVESTER COMPANY, Appellant

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

Dane Circuit Court

Opinion by Justice Wickhem

JUDGMENT—June 16, 1943

This cause came on to be heard on appeal from the order and judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order and judgment of the Circuit Court of Dane County, appealed from in this cause, be, and the same are hereby, affirmed.

Justice Barlow took no part.

[fol. 185] IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1943

No. 56

INTERNATIONAL HARVESTER COMPANY, a New Jersey Corporation, Petitioner and Appellant

v.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

OPINION—Filed June 16, 1943

This is an appeal from an order and judgment of the Circuit Court for Dane County, Alvin C. Reis, Circuit Judge. *Affirmed.*

Appeal to the Circuit Court for Dane County from an order of the Wisconsin Board of Tax Appeals which had

affirmed an additional assessment of privilege dividend taxes against appellant, International Harvester Company, a New Jersey Corporation. The order of the Wisconsin Board of Tax Appeals was dated February 13, 1942 and the order and judgment of the Circuit Court was made and entered on September 17, 1942. The material facts will be stated in the opinion.

[fol. 186] WICKHEM, J.:

Appellant is a New Jersey corporation, having its principal office in Hoboken, New Jersey. Its general executive offices are in Chicago. So far as the record discloses, it has done business in Wisconsin since 1920. The Wisconsin dividend privilege tax law was enacted and went into effect on September 26, 1935. From December 2, 1935 to October 15, 1937 appellant paid numerous dividends totalling $39,028,188.22, but did not pay any privilege dividend tax thereon. As of the end of the year 1934, the amount of surplus accumulated from Wisconsin earnings and constituting Wisconsin surplus on the basis of the formulae and method of computation prescribed by chapter 71 was $803,780.72. The amount attributable to Wisconsin as of December 31, 1935 was $2,227,499.03. The Wisconsin surplus as of October 31, 1936 was $2,608,908.26. On December 2, 1937 the Wisconsin Tax Commission, predecessor of Wisconsin Department of Taxation, notified appellant of an assessment of privilege dividend tax against it in the amount of $68,838.49, exclusive of penalties and interest, computation being based upon the statutory presumption that such dividends were paid out of previous years' earnings. Subsequently thereto, and because of the conceded rebuttal of the presumption, respondent recomputed the privilege dividend tax at $53,713.29, exclusive of penalties and interest. There is a stipulation to the effect that, assuming the law to be valid and the method of computation authorized, the amount of the privilege tax as computed is correct. The contentions made by appellant all present matters of constitutional law and statutory construction. It is contended that the privilege dividend tax contravenes the due process provision of the Wisconsin constitution and of the federal constitution; that the computation [fol. 187] adopted by the Wisconsin Department of Taxation is not authorized by the Wisconsin dividend privilege

tax law, but on the contrary, that the dividend tax law prescribes a wholly different formula; that this was not followed by the Tax Department; that Wisconsin may not tax the privilege of declaring and receiving dividends derived from earnings accumulated prior to the date when the Wisconsin dividend tax took effect.

This case is another chapter in a long history of litigation concerning the dividend tax law during which this court has passed upon the constitutionality of the law and its proper construction three times, and the United States Supreme Court has considered these matters once. *Froedtert G. & M. Co. v. Tax Comm.*, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52; *J. C. Penney Co. v. Tax Comm.*, 233 Wis. 286, 289 N. W. 677; *Wisconsin v. Minn. Mining & Mfg. Co.*, 311 U. S. 452; *J. C. Penney Co. v. Wisconsin*, 238 Wis. 69, 298 N. W. 186, (upon remand).

The controversy has developed into a battle of words and labels and it may be of service to review the litigation and ascertain just what has been authoritatively determined. On September 26, 1935 the privilege dividend tax[1] went into effect and for purposes of reference so much of it as is material here is set forth in the notes. The constitutionality and construction of this law was put in issue in *Froedtert G. & M. Co. v. Tax Comm.*, (supra) and this court there held that it levied a tax upon the privilege of transferring from the corporation to the stock holders corporate net income derived from corporate business transacted, or property located in Wisconsin. That case involved a Wisconsin corporation, but upon rehearing, it was stated without elaborate discussion that the tax was constitutional as applied to the dividends of foreign corporations. The matter again came before this court in *J. C. Penney Co. v. Tax Comm.*, 233 Wis. 286, 289 N. W. 677, and it was there held that in its application to a foreign corporation doing business in Wisconsin and deriving a portion of its surplus from net earnings in Wisconsin, the law was an unconstitutional at- [fol. 188] tempt by Wisconsin to tax a privilege which it neither gave nor protected, and that Wisconsin was consequently without jurisdiction to levy the tax. This court relied principally on the case of *Connecticut Gen. Ins. Co. v. Johnson*, 303 U. S. 77, where upon facts that appeared to

[1] Reporter will publish sec. 71.60, statutes of 1941, section 3, (1), (2), (3) and (4), as a foot note.

us to be quite indistinguishable the Supreme Court of the United States had held California to be without jurisdiction to levy a privilege tax, and in doing so, had said:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

Upon appeal to the United States Supreme Court, judgment in the *Penney* Case was reversed by a divided Court. It was held that the practical operation of the legislation is to impose an additional tax upon corporate earnings within Wisconsin, but to postpone the liability for this tax until such earnings are paid out in dividends.

"In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

After noting that the act specifically levies the tax upon the privilege of declaring and receiving dividends, that the taxpayer is a Delaware corporation with its principal offices and meeting place in New York, and that this court has held the tax to be one upon a transaction wholly beyond Wisconsin's borders or reach, the Court said:

"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax.

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction * * *."

"* * * For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A [fol. 189] state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to

opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state."

Upon remand to determine such questions as were left open by the opinion of the Supreme Court, this court in *J. C. Penney Co. v. Tax Comm.*, 238 Wis. 69, 298 N. W. 186 (1) insisted upon its exclusive power to construe the law; (2) held the law to be a privilege tax and not an income tax; (3) held that the determination of the United States Supreme Court settled all questions as to the jurisdiction of Wisconsin to levy the tax, whatever it be called, and (4) made certain directions as to its computation. The latter point need not be elaborated in this portion of the opinion. From the briefs in this case, and the memorandum of the trial court it appears to be concluded that we have here what the trial court designates an "immaculate dilemma;" that the Supreme Court of the United States has held this to be an income tax and that as such, it is invalid under the Wisconsin constitution; that the Supreme Court of Wisconsin, upon remand has persisted in designating it a privilege tax in which case the privilege being wholly exercised outside of the state, it is unconstitutional under the federal constitution.

We see no such dilemma. As we read the opinion of the United States Supreme Court, we discover no attempt by the court to usurp the function of this court so far as construing or labeling this tax is concerned. What the Su-

[fol. 190] preme Court has done is (1) to state the factual basis upon which this law must be treated as constitutional insofar as the jurisdiction of Wisconsin to levy it is concerned and (2) to hold that given the factual basis, the law is constitutional in this aspect, regardless of the designation given it by this court. In other words, the federal Supreme Court has established the judisdictional fact which is that the corporation paid the dividends in whole or in part out of property located in this state, or business transacted here. If the term "jurisdictional fact" must hereafter be relegated to the limbo of outmoded terms, the basis of Wisconsin's power to tax is the fact that it has given its protection and the benefits of government to corporate activities in Wisconsin and that profits from this activity are traceable to the fund from which dividends are paid. So far as the constitutional aspects of the cases are concerned, the Supreme Court has reduced the privilege features of the tax to mere conditions or contingencies, upon the happening of which the tax accrues.

This being true, we perceive no conflict so long as we are talking about the power of Wisconsin to tax as against the contention that the subject of the tax is beyond her borders, and hence, beyond her jurisdiction. It makes no difference what this court calls the tax. It may, for other than constitutional reasons, be important to designate the tax a privilege tax, but the label has no bearing upon the controversy here. We adhere to our determination upon remand of the *Penney* case that this is a privilege tax and that we are bound to accept the mandate of the Supreme Court that its constitutional justification from the standpoint of Wisconsin's power to tax is the fact of net earnings in Wisconsin traceable to the fund distributed by the dividend. Under the circumstances, we do not propose to re-examine contentions heretofore made and impliedly overruled that the law is void under the Wisconsin constitution. The constitutional question considered material and decided by this court in the original *Penney* Case involved the [fol. 19] federal constitution and has been answered by the Supreme Court. We consider the matter to be closed.

The next question has to do with the application and computation of the tax, and in connection with this a constitutional question is raised having to do with its restrospective operation and not litigated or involved in the previous liti-

gation. From even a casual reading of the privilege dividend tax, it is clear that the legislature meant to levy it upon the paying out and receiving of dividends out of net corporate earnings in Wisconsin, without regard to the year or years during which the earnings accrued. Subsection 3 of section 71.60 Stats. provides without qualification that the tax shall be levied for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state. Subsection 3(4) provides "in the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only on dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin." (Income attributable to this state to be computed in accordance with the provisions of chapter 71.)

"• • • In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. • • •"

This merely creates a rebuttable presumption that all of the dividend was paid out of Wisconsin earnings for the year immediately preceding the payment of the dividend. It is finally provided that if the corporation had a loss for that year the commission, upon application, is to determine the portion of such dividend paid out of surplus and undivided profits derived from business transacted, and property located within the state. There is no time limit anywhere unless the reference to the presumption be tortured into some sort of limitation of the tax to dividends paid out of the previous years' earnings and this would be a disingenuous construction. The section strongly suggests that the legislature had no misgivings as to its power to [fol. 192] reach Wisconsin earnings without regard to the time of their accrual by a tax on the privilege of paying and receiving dividends effecting their distribution.

Upon the question whether, so far as it purports to reach Wisconsin earnings without reference to the year in which they were earned, the section is unconstitutionally retroactive in application, the Court is equally divided.

Mr. Justice Fowler, Mr. Justice Fritz and Mr. Justice Fairchild are of the view (1) that since this is a privilege

tax on transactions by which dividends are declared and paid subsequent to the enactment of the statute, the tax is prospective and not retroactive in operation when it is imposed on only such of those transactions as occurred in the year in which it is imposed; (2) that the prospective character of the tax is not affected by the fact that in assessing the amount thereof,—which under the statute is to be limited to the extent that income earned in Wisconsin was used in paying the dividend in such year,—there was included undistributed income earned theretofore in Wisconsin; and (3) that these conclusions are in accord with the decision of this court upon remand in the *Penney* Case.

Mr. Chief Justice Rosenberry, Mr. Justice Martin and the writer are of the view (1) that since the United States Supreme Court has held that the label placed upon this law by the legislature or by this court is wholly ineffective to impair its constitutionality as against the contention that Wisconsin is without power to levy the tax, such label or designation or the selection by Wisconsin of the payment and receipt of the dividend as the occasion for the tax is equally ineffective to save it from objections to its retroactivity; (2) that the earnings of the corporation in Wisconsin upon which are grounded Wisconsin's power to levy the dividend tax must be within reach of a retroactive tax; (3) that the extent of permissible retroactivity should be determined upon the analogy of the income tax cases; (4) that retroactivity should only be permitted to "recent" transactions; (5) that consistently with these principles the tax may not be applied to earnings in Wisconsin which accrued prior to the last corporate fiscal year preceding the [fol. 193] enactment of Wisconsin privilege dividend tax; (6) that by reason of the severability clause, the operation of the tax should be so limited; (7) that nothing in the decision upon remand requires a different conclusion.

The court being equally divided, this results under the rules of this court in an affirmance of the judgment upon this point.

The rest of this case we consider to have been authoritatively settled by the decision of this court in the *Penney* Case upon remand. The law requires that the commission assess the tax upon the presumption that the dividend was paid out of Wisconsin earnings for the year preceding the declaration of a dividend. Upon rebuttal of this presumption, a tax may be levied upon such portion of the dividend

as is represented by Wisconsin earnings, these to be ascertained by application of the formula prescribed in Chapter 71. The proportion between the sum so arrived at and the total assets available for dividends establishes the percentage of the dividend attributable to Wisconsin earnings. In the *Penney* Case upon remand this Court said:

"• • • When the corporation declared its dividends in 1936, it drew upon its net assets in excess of its capital (surplus) as required by the law of Delaware. Its net profits for the year 1935 are to be found in its surplus at the end of the calendar year. When the company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be presumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for the year 1935 but to the whole amount of the surplus. • • •"

In making this statement it was not intended to create an artificial rebuttable presumption comparable to that created in sub-section (4) of the dividend tax act. What the court meant to hold and what we do hold is that in this situation there is a strong, if not inevitable inference to the effect noted. In other words, that the conclusion not only can be arrived at by ordniary methods of reasoning without dependence upon a judicially created presumption, but that it cannot be avoided by any evidence that we have presently in mind.

It is contended that since the statute contains no specific formula for computing the tax, this Court cannot supply [fols. 194-195] one. We deem this contention unsound. If by any process reasonably calculated to accomplish the result, the amount of Wisconsin earnings involved in the declaration sought to be taxed may be ascertained the validity of the law is not impaired by the absence of detailed specifications concerning computation. The formula for ascertaining the amount of net earnings allocable to Wisconsin is set forth in chapter 71 and the validity of this formula is well established. There is a strong if not inevitable inference that these earnings became (1) part of the general assets available for distribution as dividends, and (2) part of the dividend declared in the proportion that they bear to the total assets available for dividends. We do not deem

it necessary that there shall have been a formal transfer of earnings into a surplus account. While the statutes of New Jersey, and we suppose those of nearly every state, require that dividends be paid out of surplus, the sense in which surplus is used means excess of assets over liabilities, including capital. This concern of the law as laid down by decisions and prescribed by statutes is that dividends shall not be declared out of capital. If Wisconsin earnings have gone to swell the assets of the corporation in such a way as to create an excess of assets over liabilities, and to authorize a dividend, the Wisconsin earnings are proportionately a part of this excess, whatever it be called. The formula prescribed by this court upon remand in the *Penney* Case, that is, that the Wisconsin earnings should constitute the numerator of a fraction of which the entire amount available for dividends is the denominator, is rational and workable and was applied in this case. While we recognize the force of objection that can be made to any determination reached in this matter, the foregoing conclusions are the only ones that will accommodate themselves to premises which we must accept.

By the Court.—Order and judgment are affirmed.

[fol. 196] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed July 3, 1943

Now comes International Harvester Company, the above named Petitioner and Appellant, and in accordance with Rule 37 of this court respectfully moves the court for a rehearing of its decision and mandate filed herein on the 16th day of June, 1943, for reasons which will be set forth in the printed argument to be filed in support hereof.

Dated this 3rd day of July, 1943.

International Harvester Company, By Edward R. Lewis, Stroud, Stebbins & Wingert, Its Attorneys.

[fol. 197] IN SUPREME COURT OF WISCONSIN

EXCERPTS FROM APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

Heading appearing at page 1:

"If this court remains irreconcilably divided on the question whether the privilege dividend tax law is fatally retroactive, it should in any event state whether the determination of that issue involves the Wisconsin Constitution, the Federal Constitution, or both."

Heading "B" at page 10:

"B. The privilege dividend tax, even if otherwise valid, insofar as it operates to impose taxes on the distribution of earnings accumulated prior to date of enactment is retroactive and violative of the due process provisions of Sections 1 and 9 of Article 1 of the Wisconsin Constitution and the Fourteenth Amendment of the Constitution of the United States."

Heading appearing at page 11:

"The Formula adopted by the Wisconsin Department of Taxation is a denial of due process of law."

Heading appearing at page 16:

"The privilege dividend tax on the whole violates the due process provisions of the Wisconsin Constitution and the Fourteenth Amendment of the Federal Constitution."

[fol. 198] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER RETAINING RECORD—July 3, 1943

The said appellant having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fols. 199-200] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—September 14, 1943

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

[fol. 201] IN SUPREME COURT OF WISCONSIN

[Title omitted]

OPINION ON REHEARING—Filed September 14, 1943

WICKHEM, J. on re-hearing:

The court has thoroughly considered the motions for rehearing filed herein and is not disposed to modify its views or to restate or amplify its opinion in any respect but one. In discussing the permissible retroactivity of the privilege dividend tax and noting an equal division of the court upon that point, the opinion did not indicate whether the difference in view was based upon the constitution of the state of Wisconsin, the constitution of the United States of America, or both. It may be useful to state that the constitutionality of the law in this respect was considered under both; and the court was of the view that the same considerations governed whichever constitution was applied.

By the court—Motion for re-hearing is denied, with $25 costs.

[fol. 202] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 203] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.—Filed January 24, 1944

Now comes International Harvester Company, the above named Appellant, pursuant to Rule 13, paragraph 9, of the Rules of the Supreme Court of the United States, and states that the points on which it intends to reply in this Court in the above entitled matter are as follows:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, as applied to International Harvester Company, a New Jersey corporation, and its stockholders, especially the non-residents of Wisconsin, under the undisputed facts of the case, was invalid because in effect an imposition of a tax on transactions beyond the State's jurisdiction and hence repugnant to the Fourteenth Amendment of the Constitution of the United States.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this matter, purporting to have been made in pursuance of the provisions of Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, against International Harvester Company, a New Jersey corporation, under the undisputed facts, operated to take the property of Appellant and of its stockholders, especially the non-residents of Wisconsin, without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) The Supreme Court of Wisconsin erred in failing affirmatively to determine and hold that Section 3 of Chapter 505, Laws of 1935, as amended by Chapter 552, Laws of 1935, and Chapters 233 and 309, Laws of 1937, and the assessments of taxes thereunder against Appellant, insofar as the same operated or were applied to tax the distribution of income or profits of Appellant derived and accumulated prior to the enactment of that law, deprived Appellant and its stockholders of property without due

process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 204] Appellant further states that for the consideration of the above entitled matter it will be necessary for the Clerk of said Court to cause to be printed the entire record as filed in this Court, except only the following portions thereof:

Copy of Appeal Bond (Rec. p. 84-85)
Citation (Rec. p. 86)

Notice of Application for Entry of Judgment in Circuit Court for Dane County. (Rec. p. 179)

Respectfully Submitted, John A. Kratz, 1001 Fifteenth St. N. W., Washington, D. C.; Edward R. Lewis, 180 N. Michigan Ave., Chicago, Ill.; Ray M. Stroud, 1 W. Main St., Madison, Wis. Attorneys for Appellant.

Stroud, Stebbins & Wingert, Of Counsel.

Service of the foregoing Statement and Designation this 21st day of January, 1944, is hereby admitted.

John H. Martin, Attorney General for the State of Wisconsin. By Harold H. Evans, Assistant Attorney General for the State of Wisconsin. Attorneys for Appellee.

[fol. 204a] [File endorsement omitted]

[fol. 205] Supreme Court of the United States

Order Noting Probable Jurisdiction—February 28, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed:] File No. 48,113 Wisconsin, Supreme Court. Term No. 620. International Harvester Company, Appellant, vs. Wisconsin Department of Taxation. Filed January 21, 1944. Term No. 620 O. T. 1943.